88-1979

NO.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1988

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III, et al,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## PETITION FOR CERTIORARI

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## THE QUESTIONS PRESENTED FOR REVIEW

I

By this Court's denials of certiorari to review the State court's rulings on his First Amendment claims, is a black litigant precluded from collaterally attacking the libel judgment against him as being merely the imposition of an incident of slavery - in violation of the Thirteenth Amendment and in federally proscribed denial of equal protection of the Constitution of Virginia and her laws pertaining to libel?

II

When the petitioner, a black citizen of Virginia, has instituted a federal action seeking vindication of fundamental rights guaranteed by the Thirteenth and Fourteenth Amendments, may the district court, through invocation of the "Rooker-Feldman" doctrine, fail to exercise its mandated subject matter jurisdiction?

III

Do the statutes, derived from the Civil Rights Act of 1866, confer jurisdiction upon federal district courts to secure to a black Virginian, against a punitive state court judgment, the full and equal benefit of the constitutional privilege, which white citizens of the Commonwealth have always enjoyed, to write or speak pure expressions of opinion "however ill-founded", particularly in matters of public concern, without inhibition by actions for libel and slander?

## The Parties To The Proceeding In The Court Below

The petitioner is James N. Fleming. The respondents are: W. Bedford Moore, III; his former attorney and his attorneys: E. Gerald Tremblay, Lloyd T. Smith, John K. Taggart, III, Melvin E. Gibson, Jr., and Thomas E. Albro; and certain active and retired Justices of the Supreme Court of Virginia, namely: Harry Lee Carrico, George Moffett Cochran, Richard Harding Poff, Asbury Christian Compton, Roscoe Bolar Stephenson, Jr., Charles Stevens Russell, Alexander Marks Harman, Jr., Thomas Christian Gordon, Jr., and William Carrington Thompson.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The petitioner, James N. Fleming, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 3, 1989.

## OPINIONS BELOW

The "unpublished", per curiam, opinion of the United States Court of Appeals for the Fourth Circuit is set out in the appendix at pages 1 through 18. The unpublished memorandum of the District Judge is set out in the appendix at pages 19 through 25.

## GROUNDS FOR JURISDICTION

The judgment sought to be reviewed is dated and was entered January 3, 1989 by the United States Court of Appeals for the Fourth Circuit. (App. 26-27)

Rehearing was denied by order filed

January 31, 1989. (App. 28) By order of the Chief Justice dated the 10th day of April, 1989, the time for filing this petition was extended to May 31, 1989.

Title 28 United States Code, Section 1254(1) confers jurisdiction to review the judgment by writ of certiorari.

## THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution Of The United States:

Amendment XIII

Section 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Section 1.

*** No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Civil Rights Act of 1866 (14 Stat 27)

An Act to Protect all Persons in the United States in their Civil Rights and furnish the Means of their Vindication

[April 9, 1866]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

* * *

SEC. 3. And be it further enacted, That the district courts of the United States, within their respective districts,

shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act;

* * *

Title 28 U.S.C. 1331. Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 28 U.S.C. 1343
Civil Rights and Elective Franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of

any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

* * *

Title 42 U.S.C. 1981.
Equal Rights Under the Law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Title 42 U.S.C. 1983.
Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,suit in equity, or other proper proceeding for redress.

Title 42 U.S.C. 1985.
Conspiracy to Interfere With Civil Rights

* * *

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Title 42 U.S.C. 1986.
Action For Neglect to Prevent.

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented;

and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; * * *

Constitution Of Virginia

Article I, Section 12

Freedom of speech and of the press; right peaceably to assemble, and to petition. - That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

## STATEMENT OF THE CASE

The petitioner, James N. Fleming, is a black person, a native citizen of Virginia, and a veteran of the Korean conflict. The respondents are white Virginians. Invoking the "original jurisdiction" (28 U.S.C. 1343) of the federal district court, the petitioner filed this action for redress of unconstitutional abuse of state judicial power for the purpose and with the effect of depriving him, solely because of his race and color, of his right pursuant to the Thirteenth Amendment to be free of all badges and incidents of slavery and of his right pursuant to the Fourteenth Amendment not to be denied the equal protection of the Constitution and laws of the Commonwealth of Virginia.

Since the earliest days of the Commonwealth, white Virginians have enjoyed the constitutional privilege of

writing or speaking "any pure expression of opinion, not amounting to 'fighting words', * * * however ill-founded, without inhibition by actions for libel and slander". Chaves v. Johnson, 230 Va. 112, 119, 335 S.E.2d 97, 101-2 (1985). In this case and notwithstanding the Thirteenth Amendment and the 1866 Civil Rights Act for the enforcement thereof, the Virginia judiciary has, in effect, resurrected the General Assembly's 1847-48 enactment that

> [a] negro shall be punished with stripes: First, if he use provoking language or menacing gestures to a white person:

(App. 98);

making substitution of late 20th Century financial ruin for early 19th Century corporal punishment to the Negro who, even in a matter of public concern, dares to make a pure expression of opinion by which a white person is "provoked".

Pursuant to Section 3 of the Civil Rights Act of 1866, invoking what in 42

U.S.C. 1983 is termed "original jurisdiction", and seeking injunctive relief and recovery of damages, petitioner commenced this action as a collateral attack against a state court libel judgment which is itself a violation of the Constitution; being a denial of those fundamental citizenship rights which the Thirteenth Amendment and its implementing statutes secured primarily to black persons. The complaint charges, and it is indisputable, that "the only basis for distinction", between the holding in Chaves v. Johnson, supra, and the earlier state court defamation action against which, for ten years, petitioner had been and was unsuccessfully defending, "is that the Fleming cases suggest and permit analogy" with the foregoing quotation from Virginia's early 19th Century proscription of Offenses By Negroes. (App. 65; Complaint ¶ 25). Nevertheless, and

despite the obviousness of the imposition of an incident of slavery upon the petitioner, the lower federal courts have disclaimed the 1866 grant of "cognizance of all . . . causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts . . . of the state . . . any of the rights secured to them by the first section of [the act of 1866]", specifically, "the right . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens and [to] be subject to like punishment, pains and penalties, and to none other." (Civil Rights Act of 1866, Sections 3 and 1 (supra, p. 3); 42 U.S.C. 1981, 1983 (supra, p. 5).

The alleged defamation stemmed from the effort of the petitioner, a real estate developer, to obtain re-zoning to permit construction of low cost housing in

Albemarle County, near Charlottesville, Virginia, on property adjoining the residential estate of the respondent Moore. Professing altruistic motivation (i.e., concern for the reservoir), Moore had actively opposed such re-zoning for fourteen months. In January of 1976, after Moore had manifested interest in a suggested tree buffer strip 100 feet wide (which would confiscate eight acres of petitioner's land) to mask the proposed development from view at Moore's home, petitioner wrote the article, captioned "Racism" (App. 82), which Moore, in his action against Fleming, described as a "false, scandalous, malicious, insulting and defamatory libel", asserting that words used therein "from their usual construction and common acceptance, insults and tend to violence and breach of the peace." The article appeared in a newspaper published in the City of

Charlottesville and in a newspaper published in the surrounding County of Albemarle. In the third paragraph, Fleming expressed his opinion concerning the motivation for Moore's opposition:

> "[A] man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them, *** Bedford Moore, . . . does not want any black people within his sight".

Moore filed actions for libel in the Circuit Court of the City of Charlottesville and in the Circuit Court of the County of Albemarle (App. 84), demanding in each case $500,000 as compensatory damages and $500,00 as punitive damages. The Albemarle County litigation ended with the entry of final judgment for the plaintiff for $66,667.67 as compensatory damages and $166,666.67 as punitive damages.

As early as 1776, the citizens of Virginia had enshrined in their Bill of Rights "as the basis and foundation of

government * * * [t]hat the freedom of the press is one of the bulwarks of liberty, and can never be restrained but by despotic governments." However, flowing from the institution of slavery and by custom prevailing when the Virginia Bill of Rights was enunciated, and by statute enacted in 1847-48, it was established in Virginia that this freedom did not apply to black people and that

> "[a] negro shall be punished with stripes: First, If he use provoking language or menacing gestures to a white person: * * *". (App. 98)

The instant complaint shows that, notwithstanding the Thirteenth Amendment, the Supreme Court of Virginia yet tolerates, and in the case against this petitioner actively encourages, a continuing viability of the above quoted section of the pre-Civil War statutes proscribing "Offenses By Negroes". Allegations in petitioner's federal complaint clearly and overwhelmingly

support this conclusion.

The 3 January 1977 motions for judgment over signature of E. Gerald Tremblay, then of the Charlottesville law firm of Tremblay & Smith, alleged that W. Bedford Moore, therein identified as "a member of the white race", was "greatly insulted, mortified, held up to ridicule, humiliated [and] aggrieved" by the publication which (in the heat of the zoning controversy) had been authored by James N. Fleming who, in those pleadings, is identified as "a member of the black race". (App. 84, 85)

Judge Berry instructed the jury that Fleming's publication was libel per se (for which damages could be awarded notwithstanding the total absence of pleading or proof that the plaintiff had suffered any monetary loss). That jury awarded $10,000 as compensatory damages and $100,000 as punitive damages. On appeal,

the Supreme Court of Virginia concluded that, "while the allegation might have adversely affected Moore's work [as a university professor], the statements did not necessarily affect him in his particular profession and consequently were not defamatory per se." Fleming v. Moore, 221 Va. 884, 891, 275 S.E. 2d 632 (1981) (Fleming I). (Emphasis by the court.)

The Supreme Court of Virginia, however, (1) rejected out of hand Fleming's claim of constitutional privilege, (2) admittedly "modified" the ancient and universal requirement of proof of special damages in actions of libel per quod[1], and (3) remanded the action for re-

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[1]However, on 6 September 1985, in its opinion in Great Coastal Express v. Ellington, 230 Va. 142, 334 S.E. 2d 846 (1985), the Virginia court, without so saying, repudiated its tortured reasoning in the penultimate paragraph of Fleming I, by stating, obiter dictum, the reason why in cases of alleged defamation per quod the plaintiff must plead and prove pecuniary loss, viz: "It is difficult, if not impossible, to prove with mathematical

trial, thereby making possible the punishment of a black person for authoring a publication which was merely "provoking" to a white person. (Fleming I, supra).

The court's awareness that Moore is white and that Fleming is black and the influence of that circumstance upon its decision are disclosed by its distortion of the evidence to reach its predetermined conclusion.

> "Fleming, a black real estate broker and developer * * * proposed to construct a planned unit development of high density residential units for a predominantly black, lower-middle-income group of occupants. [221 Va. at 887]
>
> "* * * Moore's position was that the project * * * would also detract from the value of his own property. * * * Moore felt that the [tree] buffer would be a good idea since it

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precision the quantum of damages for injury to reputation, humiliation, and embarrassment which may flow from a defamation. For this reason, the common law, as early as 1670, modified the usual standard of proof of damages in those cases where the words uttered were actionable per se." (230 Va. at 148; 334 S.E. 2d at 850).

> would screen his property from the "Evergreen" development. [221 Va. at 887] * * *
>
> "Since Moore's involvement at the public hearings was in his capacity as an adjoining private landowner whose property might be affected by the proposed development, we conclude that he was not a public figure. Therefore, he was not required to show, as a prerequisite to recovery of compensatory damages, that Fleming acted with malice that met the New York Times standard. [221 Va. at 892] * * *
>
> * * * Since Fleming is not a media defendant and Moore is not a public figure, Gertz [v. Robert Welch, Inc., 418 U.S. 323 (1974)] does not control the present case [221 Va. at 89].

Moore's testimony disclosed no concern of his that the project would detract from the value of his property. Except that he welcomed the idea of a tree buffer, he offered no testimony as to how his property might be affected by the proposed development. His testimony was that his concern was the protection of the reservoir. In a pre-trial deposition reproduced in Record No. 78-1061 of the

Supreme Court of Virginia (Joint Appendix at pages 378), he testified that he would have no objection to the color of the collar, or to the color of the skin, of the residents of the proposed development "if they're good neighbors".

In his testimony in pre-trial deposition and at trial, Moore never wavered from the stance he had consistently taken before the county authorities that his opposition to the proposed development was for the good of his neighbors and the county as a whole.

On 21 October 1982, the second jury (from which Moore had peremptorily eliminated the two black veniremen who were otherwise qualified) found a "compensatory" award of $100,000 for Moore's admitted measurable loss of nothing. Further, substituting financial ruin for physical chastisement, they awarded "punitive" damages of $250,000

with pre-judgment interest @ 12% from 16 January 1976. On the day the verdict was returned the award totaled $552,993.14; thereafter to increase at the rate of $115.06 a day. On 3 June 1983 when judgment was entered, it would have been worth $578,870.86.

In its order allowing a second appeal in the action for alleged libel, the Supreme Court of Virginia refused to entertain the question of constitutional privilege. (App. 92-97) The opinion in Fleming II (sub nom, The Gazette v. Harris), 229 Va. 1, 43, 325 S.E. 2d 713, 742 (1985), held that the award of $100,000 as compensatory damages was "so out of proportion to the damages sustained to suggest that it is not the product of a fair and impartial decision" (229 Va. at 48) and that the punitive award of $250,000 "on its face indicates prejudice

or partiality"[2] (229 Va. at 51). Nevertheless, the court sustained the finding of liability. But Virginia's pre-Civil War legislation concerning such Offenses By Negroes had limited punishment to 39 stripes at any one time. (App. 98) Hence, the court required remittitur of a "substantial" portion of both awards or, at the option of the plaintiff, a new trial limited to the measure of damages. Neither the lack of fairness and impartiality nor the indication of prejudice and partiality was seen as vitiating the decision to punish Fleming for publishing the article by which a white person was provoked. The appellate court was concerned only by the severity of the punishment.

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[2]This Court's admonition in Minneapolis, St. Paul, etc. Railway Co. v. Moquin, 283 U.S. 520, 521 (1931), is that appeals to passion and prejudice "may be quite as effective to beget a wholly wrong verdict as to produce an excessive one".

The crowning manifestation of the lingering viability of the 1847-48 statute came on 7 March 1986 when, by order denying re-hearing of Fleming's petition for appeal from the final judgment for $233,333.34 entered after the remittitur proceedings, the Supreme Court of Virginia refused to conform[3] the judgment against Fleming to its 6 September 1985 holding (involving two white litigants) in Chaves v. Johnson, supra. In Chaves, the Supreme Court of Virginia had held:

> Pure expressions of opinion, not amounting to "fighting words," cannot form the basis of an action for defamation. The First Amendment to the Federal Constitution and article 1 section 12 of the Constitution of Virginia protect the right of the people to teach, preach, write, or speak any such opinion, however ill-

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[3]In City of Norfolk v. Stephenson, 185 Va. 305, 315, 38 S.E. 2d, 570, 574-75, 171 ALR 1344, 1350-51 (1946), the court had held that the decision of the appellate court would conform to an intervening change in the rules which govern citing United States v. The Schooner Peggy, 1 Cranch (5 U.S.) 103, 110 (1801) and other authorities.

> founded, without inhibition by actions for libel and slander. "[E]rror of opinion may be tolerated where reason is left free to combat it." Thomas Jefferson's First Inaugural Address (1801). "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).
>
> * * *
>
> It is for the court not the jury, to determine as a matter of law whether an allegedly libelous statement is one of fact or one of opinion. * *

(230 Va. at 119)

Fleming's complaint, in paragraph 2 thereof, alleges: "That which was written and published by Fleming of and concerning Moore is more readily seen as pure expression of opinion[4] than that which was written and published by Johnson of and concerning Chaves.[5] The only basis for

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[4]One can only opine what another person "wants" or "does not want".

[5] * * * In a letter to the members of the Council of the City of Fredericksburg Johnson, an architect, had charged (1) that his competitor, Chaves, "has had n

distinction between Chaves v. Johnson and the Fleming cases is that the Fleming cases suggest and permit analogy with the punishment of a Negro for his use of language which provoked a white person." (App. 65) On motion to dismiss, this allegation is taken as true.

Petitioner's federal complaint requested interlocutory injunctive relief against enforcement of payment of the defamation judgment and prays judgment for $750,000 in compensatory damages and $250,000 in punitive damages against Moore (the defamation plaintiff), against Moore's attorneys, and against the

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prior experience in this type of project" and (2) that council had "agree[d] to pay [to Chaves] an Architectural fee that is over 50% more than what could be considered a reasonable fee." In Chaves' ensuant action for damages, the trial court set aside the verdict for the plaintiff on the defamation count, "on the grounds that Johnson's statements were mere statements of opinion." (230 Va. at 118; 335 S.E. 2d at 101) (Complaint ¶ 24). The Supreme Court of Virginia agreed.

participating Justices of the Supreme Court of Virginia, jointly and severally, for their having denied to Fleming (or having caused Fleming to be denied) the "full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens" and for their having subjected him to punishment and penalties to which white citizens are not subject. (Civil Rights Act of 1866 (14 Stat 27); 42 U.S.C. 1981)

Basis For Jurisdiction
Of Federal District Court

Jurisdiction of the district court was invoked under 28 U.S.C. 2201 and, further, under 28 U.S.C. 1331 and 1343(a); this being an action arising under 42 U.S.C. 1981, 1983, 1985(3), and 1986.

On motions of the defendants, the district court summarily dismissed the action "for lack of subject matter juris-

diction", citing as authority District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). The Court of Appeals for the Fourth Circuit affirmed, citing the Rooker-Feldman doctrine (Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and District of Columbia Court of Appeals v. Feldman, supra.) and 28 U.S.C. § 1257.

## REASONS FOR ALLOWANCE OF THE WRIT

### I

### Summary Of The Argument

Ultimately, this litigation should firmly establish that no person may with impunity impose a badge or incident of slavery upon a black person in violation of the Thirteenth Amendment and the Civil Rights Act of 1866 (14 Stat 27).

> "By making the deprivation of ["absolute"] right actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; " Cary v. Piphus, 435 U.S. 247, 266 (1978).

Presently, however, there are only two questions before this Court:

(1) Whether the Congress has ever repealed its 1866 grant unto the lower federal courts of "cognizance of . . . all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be" (14 Stat 27, Sec 3) their right "to full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens and to be subject to like punishment, pains and penalties, and to none other" (Id. Sec 1; 42 U.S.C. 1981); and

(2) Whether, by the so-called Rooker-Feldman doctrine or by any other means, this Court has ever pretended to repeal such grant of jurisdiction.

> "The history of the revision makes abundantly clear that Congress did not intend to alter the content of federal statutory law."

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 625 (1979) (Concurring opinion). In Mitchum v. Foster, 407 U.S. 225, 242 (1972) the Court noted that Congress "realized that state officers might, in fact, be antipathetic to the vindication of those [federally created] rights; and it believed that these failings extended to the state courts."

II

The Bar of Rooker-Feldman, As to This Case, Is Figmentary

A

Because The Violations Of Section 1 Of The Civil Rights Act of 1866 Are Indisputable, Subject Matter Jurisdiction Pursuant To Section 3 Is Clear

The relevant teachings of Baker v. Carr, 369 U.S. 186, 199 (1962) are (1) that "[d]ismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would . . . be justified only if that claim were 'so attenuated and

unsubstantial as to be absolutely devoid of merit'" and (2) that without deeming "the asserted federal constitutional claim unsubstantial and frivolous, [it] should not have dismissed the complaint for want of jurisdiction of the subject matter."

Although they were unable or unwilling to vindicate the constitutional liberties which the courts of Virginia had denied to this petitioner solely because of race and color, certain jurists in the courts below perceived fundamental flaws in the underlying defamation litigation. Dissenting from the order of remand in Fleming I, supra, Justice Harrison wrote:

> "I would enter final judgment for the defendant." (221 Va at 894).

At the 16 January 1987 hearing on this petitioner's application for interlocutory injunctive relief, Chief District Judge Turk said:

> "I think the Virginia Supreme Court was wrong in not following the dissent of Albertis Harrison at the

time because I think he was absolutely right" (App. 33-34).

Three days later, in the order of the Court of Appeals for the Fourth Circuit denying interlocutory injunctive relief, Circuit Judge H. E. Widener, Jr., wrote:

> "It is claimed that this is a badge of slavery, which, of course, it is." (App. 36).

Senior District Judge Robert R. Merhige, Jr., judge designate, evidenced his recognition of the injustice of which the petitioner complains:

> "In essence, plaintiff claims that the state libel suit judgment was an 'incident of slavery' in violation of the Thirteenth Amendment because it penalizes a black person for speaking out against a white person, as traditionally occurred by custom and statute. He next claims that his constitutional right to speak and publish his opinions has been infringed upon by this judgment, while the rights of white persons are not similarly infringed upon, in violation of the Equal Protection Clause." (App. 22-23).

The per curiam opinion of the court of appeals does not entirely avoid recog-

nition of merit in the petitioner's basic contention. After noting that this Court had declined certiorari review of the First Amendment challenges, the opinion below acknowledges that

> "[t]he Thirteenth Amendment and equal protection arguments raised by Fleming present a harder question" (App. 13)

-- a question which that court avoided by suggesting claim preclusion. Even so, in declining to impose sanctions under Fed. R. App. P. 38, the court of appeals concluded its opinion, viz:

> "We cannot say that Fleming's jurisdictional arguments sank to the level of frivolousness." (App. 18)

According to Baker v. Carr, supra, jurisdiction of the federal district court is manifest by every recorded observation of any federal judge who has considered this case in the courts below.

B.

## The Inapplicability Of The Rooker-Feldman Limitation Is Clear

The Thirteenth Amendment created a universal charter of freedom, abolishing every badge and indicia of inferiority flowing from the institution of slavery and creating an affirmative duty on every branch of government to enforce its mandate. The Civil Rights Act of 1866 was passed for the enforcement of the Thirteenth Amendment. Concerning that Act, this Court has said:

> [I]t is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein.

Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1986). The narrow holdings in Jones were [1] "that Section 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and [2] that the statute, thus construed,

is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." (392 U.S. at 413; emphasis by the Court).

However, as this Court in Jones v. Mayer Co. noted, the Civil Rights Act of 1866 was not intended to be read narrowly.

> Of course, Senator Trumbill's bill would, as he pointed out, "destroy all [the] discriminations" embodied in the Black Codes, but it would do more; It would affirmatively secure for all men, whatever their race or color what the Senator called the "great fundamental right" . . . [including] the right to enforce rights in the courts . . . . As to those basic civil rights, the Senator said, the bill would "break down all discrimination between black men and white men."
>
> That the bill would indeed have so sweeping an effect was seen as its great virtue by its friends and as its great dangers by its enemies but was disputed by none.

392 U.S. at 430-31.

Accordingly, we submit that Section 1981 (also derived from Section 1 of the 1866 Act) bars all action, private as well as public, which imposes upon a black

person any other badge or incident of slavery, e.g., "punishment, pains, penalties . . . and exactions" to which white citizens are not subject; and we further submit that this specific statutory bar transcends any and all provisions, doctrines, or theories of law by which its evasion might be sought.

Jurisdiction for petitioner's case was conferred on district courts by Section 3 of the Civil Rights Act of 1866. Not until 1875 did Congress extend to the circuit courts original jurisdiction, concurrent with the courts of the several States, "of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made . . ." The district courts had no general "arising under" jurisdiction until the

adoption of the 1911 Judicial Code when the district courts became the sole federal courts of first instance. (Justice White, concurring in Chapman v. Houston Welfare Rights Org., supra.)

It was to enforce the Thirteenth Amendment (rather than to extend federal protection to commercial corporations) that Congress first crafted the unique "original jurisdiction" to entertain collateral attack against state court judgments. After a Circuit Justice denied a stay of execution pending petition for certiorari to the Illinois court, the judgment debtor filed in federal court the collateral attack which reached this Court as Vendo Co. vs. Lektro-Vend Corp., 433 U.S. 623 (1977). Four Justices agreed with the lower courts that federal jurisdiction existed. Five Justices considered that jurisdiction would have existed under somewhat different facts.

The separate opinions and concurrences of six of the Justices who participated in Pennzoil Co. v. Texaco, _ U.S.___ , 95 L.Ed. 2d 1, 107 S. Ct. 1519 (1987), made crystal clear the inapplicability of the Rooker-Feldman doctrine to this case if, indeed, such was not abundantly clear from the Court's rejection of Pennzoil's argument that Rooker-Feldman was an absolute bar.

Justice Scalia (with whom Justice O'Connor joined) wrote separately

> "only to indicate that I do not believe that the so-called Rooker-Feldman doctrine deprives the court of jurisdiction to decide Texaco's challenge to the constitutionality of the Texas stay and lien provisions."

Justice Brennan (with whom Justice Marshall joined) wrote:

> "Further, I reject Pennzoil's contention that District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), forbid collateral review in this instance. In Rooker and Feldman, the Court held that lower

> federal courts lack jurisdiction to engage in appellate review of state court determinations. [Emphasis added.] In this case, however, Texaco filed the 1983 action only to protect its federal constitutional right to a meaningful opportunity for appellate review, not to challenge the merits of the Texas suit. Texaco's federal action seeking a stay of judgment pending appeal is therefore an action "'separable from and collateral to'" the merits of the state court judgment." [Citations omitted.]

Justice Blackmun wrote:

> "In addition, for the reasons given by Justice Brennan . . ., I believe that federal collateral review is not barred by the principles announced in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)."

In footnote 3 of his opinion, Justice Stevens wrote:

> "For the reasons stated by Justice Brennan . . . and Justice Scalia ... I do not believe that the doctrine described in . . . Feldman . . . and Rooker . . . bars the federal courts from considering Texaco's claims."

Justice Brennan pointed out that the underlying issues in Pennzoil "- arising out of a commercial contract dispute - do

not involve fundamental constitutional rights", as was the case in Henry v. First National Bank of Clarksdale, 595 F.2d 291, 299-300 (5th Cir. 1979), cert. denied 444 U.S. 1074 (1980). Nevertheless, he would have placed Pennzoil beyond the reach of Rooker and Feldman, but only to the extent that Texaco, Inc., sought to protect its federal constitutional right to a meaningful opportunity for review in the state's appellate court. Here, as in Henry, Fleming's constitutional claims involve fundamental federal constitutional rights. Neither Rooker nor Feldman bars their assertion and vindication in a district court of the United States.

Disclaimer of subject matter jurisdiction in this case is retreat from the Thirteenth Amendment and from the Act which the 39th Congress passed for that Amendment's enforcement. Such disclaimer, if permitted to stand, would restore the

slave code.

C.

This Action Is "Separable From And Collateral To" The State Litigation

The opinion below suggests (1) that the petitioner's Thirteenth Amendment and Equal Protection claims are "inextricably intertwined" with the state court decision and, (2) hence, because they "could have and should have been raised" in the petition to the Supreme Court of Virginia for conformation with the then recent explication of the Virginia Constitution in Chaves v. Johnson, supra, petitioner is now precluded from raising them in a federal court. We are not told, however, what principle or precedent in state law might be encountered. The phrase "inextricably intertwined" is not a talismanic charm, the mere recitation of which will permit the lower federal courts to blindly defer to States Rights.

This action is "separable from and

collateral to" the state litigation. There is and there can be no constitutionally permissible theory or process of state law which could lead to the constitutionally forbidden result which the state courts achieved in the Fleming cases. There is and can be no "intertwinement" (inextricable or otherwise) of the federal constitutional principle with state law because there is and can be no state law or valid "existing Virginia precedents" permitting or leading to the abridgment of the fundamental rights secured by the Thirteenth Amendment and its statutory implementation. No process of reasoning can make lawful the imposition of badges and incidents of slavery which fundamental law clearly forbids.

The courts below disavowed jurisdiction to conduct appellate review of a State court decision. In this case,

appellate review of the State litigation is not called for. The manner in which petitioner was found liable and answerable in damages is immaterial. He may no more be mulcted in damages for making free expression of opinion (as white citizens have been constitutionally privileged to do since the earliest days of the Commonwealth) than he may be fined and imprisoned for attending a religious worship service on the Sabbath. Appellate review of a judgment purporting to effect either result would be superfluous. The abridgment of fundamental right -- the obvious unconstitutionality of the judgment itself -- makes it subject to collateral attack.

D.

Petitioner's Thirteenth Amendment Claims Are Not Precluded

The complaint, in paragraph 4, clearly states that "[t]he violation of

the Thirteenth Amendment herein demonstrated and the concomitant violation of the Equal Protection Clause of the Fourteenth Amendment have not been previously charged in any proceeding in any court." (App. 46-47). Moreover, the petitioner could not have raised these arguments in his application to the Supreme Court of Virginia for a rehearing of his third petition for appeal and for conformation of the final judgment against him to its 15 September 1985 holding in Chaves v. Johnson, supra. As, in Pulliam v. Allen, 466 U.S. 522 (1984):

> "It is no longer proper to assume that a state court will not act to prevent a federal constitutional deprivation or that a state judge will be implicated in that deprivation." (Emphasis added).

Until such had actually occurred, petitioner could not charge that the Virginia court would disregard this Court's precedent which it had adopted and followed in City of Norfolk v. Stephenson,

supra. Moreover, it would have been most impolitic to charge tantamount violation of 18 U.S.C. 241 or 18 U.S.C. 242 except in a forum where proof may be heard.

Then, too, Fleming had neither "a full and fair opportunity [nor] an adequate incentive to litigate 'to the hilt' the issues in question" (Haring v. Prosise, 462 U.S. 306, 311 (1983)).

> Moreover, additional exceptions to collateral estoppel may be warranted in § 1983 actions in light of the "understanding of § 1983" that "the federal courts could step in where the state courts were unable or unwilling to protect federal rights." (462 U.S. at 313-314)

In Haring, this Court canvassed the relevant decisions of the Supreme Court of Virginia to determine the extent to which 28 U.S.C. 1738 requires preclusive effect to be given to final judgments of Virginia courts. This Court found:

> [C]ollateral estoppel precludes the litigation of only those issues necessary to support the judgment entered in the first action. As the Virginia Supreme Court stated in

> Petrus v. Robbins, 196 Va 322, 330, 83 SE 2d 408, 412 (1954), "[t]o render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined,- that is, that the verdict could not have been rendered without deciding that matter." (462 U.S. at 315)

Petitioner's earlier federal case (Fleming v. Moore, 780 F.2d 438, 4th Cir. 1985; cert. denied April 21, 1986, __ U.S. ___ ) produced no decision on the merits; hence, it is not preclusive of any of the instant assertions.

E.

The Respondent State Justices Do Not Have Absolute Immunity

The district court hinted that judicial immunity might illuminate a "flaw" in the petitioner's complaint. The court of appeals, in footnote 7 of its per curiam opinion, intimated that the respondent Justices of the Supreme Court of Virginia, acting within their judicial capacities, "enjoy absolute immunity from

monetary damages". We think the question has been put to rest, however, by the holding in Forrester v. White, 484 U.S. _ __, 98L.Ed.2d 555, 563, 108 S.Ct. 538, 542 (1988), that absolute immunity does not attend appellate justices serving in the "ordinary mechanisms of review" and that if appellate justices claim exemption from personal liability they have the burden of showing that such exemption is "justified by overriding considerations of public policy."

III

The Several Opinions In Petitioner's Case Would Chill Unto Freezing The Exercise By Black Virginians Of Their Federally Promised Free And Uninhibited Right To Protest Racism

Already there is indication that the Fleming opinions will encourage the bar and bench to complete the resurrection of the 1847-48 proscription of a Negro's use of "provoking language" to [or concerning] a white person and to disregard the

Nation's promise to black persons of "full and equal benefit" of the fundamental right of free Virginians to teach, preach, write or speak any pure expression of opinion "without inhibition by actions for libel or slander" (Chaves v. Johnson, supra).

On 12 May 1989, a panel of the United States Court of Appeals for the Fourth Circuit heard arguments concerning the right of black defendants to remove to federal court an action for alleged defamation brought by a white police officer against a black citizen who, in a matter of public concern, made pure expression of his opinion by which the police officer was offended. (Upchurch v. Wheeler, et al., 4th Cir. Record No. 88-2661). Solely because Aaron Wheeler (a black man, serving as chairman of the legal redress committee of the Virginia Beach Branch of the NAACP) was quoted in

the press as having characterized, as a senseless, racially motivated murder, the 20 June 1987 fatal shooting of an unarmed 24 year old black man by police officer Eddie Upchurch (who is white), Upchurch brought action against Wheeler and the Virginia State Conference NAACP in the Circuit Court of the City of Virginia Beach, demanding "[c]ompensatory damages . . . for lost wages, benefits, damages to his reputation and standing in the community, embarrassment, humiliation and mental suffering in the amount of $1,000,000" and "[p]unitive damages . . . for the defamatory statements made intentionally, maliciously, and with the express intent to cause harm and damage to the plaintiff, in the amount of $1,000,000." (App. 99-109)

By pre-trial discovery, the defendants developed that Wheeler's alleged statements followed public dis-

closure of accounts of eyewitnesses, the report of findings of the medical examiner, and reports that there were no fingerprints of the victim on the officer's gun and no powder residue on the victim's hand; all of which contradicted the officer's unsupported statement (which the Commonwealth's Attorney accepted) that the weapon was unintentionally discharged in a struggle for its possession. (App. 115-117)

Defendant's motion for summary judgment (App. 109-111), citing Chaves v. Johnson, supra, was denied. Citing Chaves v. Johnson, the defendants then petitioned the Supreme Court of Virginia for a Writ of Mandamus to compel the trial court, "in advance of trial, to rule as a matter of law whether the alleged utterances of Aaron Wheeler were statements of fact or expressions of opinion." Mandamus was denied.

Wheeler had merely expressed his opinion (gleaned from official statements and public knowledge) as to what was in the mind of the police officer when the fatal shot was fired. Removal of the defamation action to federal court was sought after the state court had overruled the defendants' motions for summary judgment and thereby had denied Wheeler's right, without inhibition by actions for libel and slander, to publicly disagree with the self serving explanation of the white policeman and that policeman's "exoneration" by the Commonwealth's Attorney. (App. 112)

When viewed in contrast with Chaves v. Johnson, the Upchurch case, as does the Fleming case, demonstrates that, in Virginia, the law of libel is one thing if the defendant is white and another thing if the defendant is black and the plaintiff is white.

## CONCLUSION

The promise of the Virginia Constitution to white citizens is that they may make any pure expression of opinion without inhibition by actions for libel and slander. The same freedom to black persons in Virginia is the commitment of the Nation. Petitioner prays that a writ of certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit will be granted.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 87-6619

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JAMES W. FLEMING,

Plaintiff-Appellant,

versus

W. BEDFORD MOORE; E. GERALD TREMBLAY; LLOYD T. SMITH; JOHN K. TAGGART, III; MELVIN E. GIBSON, JR.; THOMAS E. ALBRO; HARRY LEE CARRICO, Chief Justice of the Supreme Court of Virginia; GEORGE MOFFETT COCHRAN, Justice of the Supreme Court of Virginia; RICHARD HARDING POFF, Justice of the Supreme Court of Virginia; ASBURY CHRISTIAN COMPTON, Justice of the Supreme Court of Virginia; ROSCOE BOLAR STEPHENSON, JR., Justice of the Supreme Court of Virginia; CHARLES STEVENS RUSSELL, Justice of the Supreme Court of Virginia: ALEXANDER MARKS HARMAN, JR., Senior Justice of the Supreme Court of Virginia; THOMAS CHRISTIAN GORDON, JR., Retired Justice of the Supreme Court of Virginia; WILLIAM CARRINGTON THOMPSON, Retired Justice of the Supreme Court of Virginia,

Defendants-Appellees.

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Appeal from the United States District Court for the Western District of Virginia, at Richmond. Robert R. Merhige, Jr., Senior District Judge. (CA-87-4-C).

Argued: October 7, 1988
Decided: January 3, 1989

Before HALL, MURNAGHAN, AND CHAPMAN, Circuit Judges.

Samuel Wilbert Tucker (HILL, TUCKER & MARSH; J. Benjamin Dick on brief) for Appellant. Jay T. Swett (Ellen L. Bane, MCGUIRE, WOODS, BATTLE & BOOTHE on brief); Guy W. Horsley, Jr., Assistant Attorney General (Thomas E. Albro, SMITH, TAGGART, GIBSON & ALBRO on brief) for Appellees.

PER CURIAM:

This appeal represents yet another in a long series of attempts by James N. Fleming to overturn a Virginia Supreme Court decision upholding a libel judgment against him. Clearly, neither this Court nor the district court has authority to sit in appellate review of the Supreme Court of Virginia, or any other state court. Accordingly, we affirm the district court's dismissal of Fleming's suit for lack of subject matter jurisdiction.

I.

The dispute giving rise to the case began in 1976 when the appellant, James N. Fleming, published a newspaper advertisement charging W. Bedford Moore III of racism for opposing a proposed low income housing development near Charlottesville, Virginia. Moore sued Fleming for defamation in Albemarle County Circuit Court. Two trials followed. At the first, the jury found in Moore's favor, but the Virginia Supreme Court reversed, holding that the trial court erred in ruling that the advertisement was defamatory per se. Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981), cert. denied, 469 U.S. 966 (1984). At the second trial, the jury again ruled in Moore's favor and awarded him damages. The Virginia Supreme Court upheld Fleming's liability but reversed the damage award as excessive. Fleming v.

Moore, sub. nom. Gazette, Inc. v. Harris, 229 Va. 1, 325 S.E.2d 713 (1985), cert. denied, 472 U.S. 1032 (1985). On remand the state circuit court entered a judgment of $233,333.34 in favor of Moore.

In the meantime, the Virginia Supreme Court decided Chaves v. Johnson, 230 Va. 112, 335, S.E.2d 97 (1985), wherein the court stated that "[p]ure expressions of opinion, not amounting to 'fighting words', cannot form the basis of an action for defamation." Id. at 119, 335 S.E.2d at 101. Fleming believed the rule announced in Chaves forbade entry of a libel judgment against him. The Virginia Supreme court refused, however, to reconsider the libel judgment against Fleming in light of Chaves. Fleming once again petitioned the United States Supreme Court for a writ of certiorari, which was denied. Fleming v. Moore, 479 U.S. 890 (1986). Fleming then petitioned for a

rehearing, but that request was denied. 479 U.S. 1012 (1986). By Fleming's own account,[1] his petition for rehearing asked the United States Supreme Court to require the Virginia court to reconsider the judgment against him in light of Chaves.

Unsatisfied with pursuing the proper route for review of state court judgments, (i.e., petition to the United States Supreme Court for a writ of certiorari), Fleming latched onto another strategy: challenging the Virginia decision through lawsuits in federal district court. In 1984, he filed a § 1983 action[2] against Moore, the man he had allegedly libeled, seeking to enjoin him from enforcing the defamation judgment awarded by the Virginia courts. The district court dismissed the suit, and this Court

---

[1]This court does not have before it a copy of Fleming's petition for rehearing.

[2]42 U.S.C. § 1983.

affirmed, reasoning that "Fleming's sole possible federal remedy is by appeal from the Supreme Court of Virginia to the United States Supreme Court." Fleming v. Moore, 780 F.2d 438 (4th Cir. 1985) ("Fleming I"), cert. denied, 475 U.S. 1123 (1986).

Undaunted, Fleming brought the present action in the federal district court for the Western District of Virginia. He filed suit under 42 U.S.C.§§ 1981, 1983, 1985(3), 1986 and 1988, alleging that Moore, his attorneys and the justices of the Virginia Supreme Court who ruled against him on various appeals had deprived him of his rights under the Thirteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the First Amendment (as incorporated through the Fourteenth). Fleming claimed that the Virginia Supreme Court decision imposed a badge of slavery on him within

the meaning on the Thirteenth Amendment by punishing him as a black person for criticizing a white man. He also claimed that the Chaves decision and the Virginia Supreme Court's refusal to reconsider his case in light of it, represented a violation of equal protection by demonstrating Virginia's willingness to protect whites' freedom to express their opinions, while denying similar protection to blacks.[3]

Fleming asked the district court to declare the Virginia Supreme Court judgment null and void, to enjoin permanently the enforcement of the libel judgment and to award $1,000,000 in compensatory and punitive damages against the defendants.

The district court rejected all

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[3]Fleming asserts that the defendant in Chaves was white. However, the Virginia Supreme Court's opinion in Chaves makes no reference to the race of any party.

claims for lack of subject matter jurisdiction. This appeal followed.

II.

Even if we were to assume arguendo, in our opinion, that the Virginia Supreme Court was in error in upholding the libel judgment against Fleming, we would be without jurisdiction to correct the mistake. Neither the district court nor this Court could grant relief to Fleming on any of his claims without deciding that the Virginia Supreme Court wrongly decided the merits of Fleming's state appeal. In effect, Fleming asks us to sit in appellate review of a states's highest court. This we may not do.

In a line of cases stretching over the past 65 years, the Supreme Court has emphasized that federal district courts and federal courts of appeals have no authority to review a final judgment of a state court that has acted in its judicial

capacity. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415, 416 (1923). Only the United States Supreme Court has that power. Feldman, 460 U.S. at 482; 28 U.S.C. § 1257.

Appellant argues, however, that the Rooker-Feldman doctrine does not apply where, as here, the plaintiff alleges violations of fundamental constitutional rights. That assertion is clearly incorrect. The plaintiff in Feldman had alleged a violation of his Fifth Amendment rights and yet the Supreme Court ruled that he could not challenge a District of Columbia Court of Appeals decision in federal district court.[4] 460 U.S. at 468-69 & n.3, 482.

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[4]For purposes of the Rooker-Feldman doctrine, the Court of Appeals of the District of Columbia is equivalent to a state's highest court. 460 U.S. at 464.

The appellant also asserts that the Rooker-Feldman doctrine is inapplicable where, as here, a plaintiff sues under federal statutes that expressly allow a remedy for deprivation of civil rights. In support of the proposition, appellant cites Mitchum v. Foster, 407 U.S. 225 (1972), in which the Supreme Court held that § 1983 actions fell within the exceptions to the Anti-Injunction Act,[5] and therefore a federal district court was not absolutely precluded under all circumstances from enjoining a pending state court proceeding. Id. at 243. Mitchum provides no support for Fleming's argument. Mitchum in no way authorized use of § 1983 to obtain appellate review of final state court decisions in federal district courts. Numerous circuits, including this one, have refused to allow §1983 plaintiffs to obtain judicial review

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[5] 28 U.S.C. § 2283.

of state court judgments in lower federal courts. In Fleming I, this Court stated that "[w]e detect nothing in 42 U.S.C. § 1983 that would permit a federal court to relitigate the libel issues" decided adversely to Fleming by the Virginia Supreme Court. 780 F.2d at 440. See also Worldwide Church of God v. McNair, 805 F.2d 888, 893 n.4 (9th Cir. 1986) ("Cases subsequent to Feldman make it clear that Feldman's jurisdictional bar applies in the § 1983 context, as elsewhere"); Curry v. Baker, 802 F.2d 1302, 1310 n.5 (11th Cir.), cert. dismissed, 479 U.S. 1023 (1986); Hale v. Harney, 786 F.2d 688, 691 (5th Cir. 1986; Brinkmann v. Johnston, 793 F.2d 111, 113 (5th Cir. 1986).

Contrary to Fleming's argument, the Supreme Court's decision in Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S. Ct. 1519 (1987), provides no support for his position. Although five justices stated

in Pennzoil that the Rooker-Feldman doctrine did not preclude Texaco's § 1983 suit in federal court,[6] the facts of that case are clearly distinguishable from the instant one. As Justice Brennan explained:

> Texaco filed the § 1983 action only to protect its federal constitutional right to a meaningful opportunity to appellate review, not to challenge the merits of the Texas suit. Texaco's Federal action seeking a stay of judgment pending appeal is therefore an action "'separable from and collateral to'" the merits of the state court judgment.

481 U.S. at _____, 107 S. Ct. at 1531 (Brennan, J., concurring) (emphasis supplied) (citations omitted). By contrast, the instant appeal seeks to overturn the Virginia Supreme Court's decision on the merits.

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[6]The Pennzoil Court, however, held that the federal district court should have abstained from hearing Texaco's constitutional claims on the basis of the doctrine enunciated in Younger v. Harris, 401 U.S. 37 (1971). See 481 U.S. at ___, 107 S. Ct. at 1525.

Fleming's First Amendment arguments obviously present a direct challenge to the Virginia Supreme Court decision. He had ample opportunity to raise his First Amendment challenges before the Virginia Supreme Court and to petition the United States Supreme Court for a writ of certiorari on those constitutional rulings adverse to him.

The Thirteenth Amendment and equal protection arguments raised by Fleming present a harder question. As we understand Fleming's position, the alleged violations of the Thirteenth and Fourteenth Amendments did not become apparent until the Virginia Supreme Court rendered its decision in Chaves, which took place after Fleming's first two appeals to the Virginia court. According to that theory, Fleming would have had no reason or opportunity to raise the Thirteenth and Fourteenth Amendment

arguments when his appeals were before the Virginia Supreme Court because those constitutional violations did not arise until later, when Chaves was decided. Such an argument lacks merit. By Fleming's own account, he petitioned the Virginia Supreme Court for a rehearing of his case in light of Chaves, and when that court refused, he petitioned the United States Supreme Court for a rehearing following a denial of certiorari. Fleming could have and should have raised his Thirteenth and Fourteenth Amendment arguments in those rehearing petitions. We do not have before us the content of those petitions and thus do not know whether Fleming actually preserved the arguments by raising them. Nonetheless, the Supreme Court has emphasized that a litigant's failure to raise constitutional claims in state court does not provide federal district courts with jurisdiction

over those claims if they are "inextricably intertwined" with the state court decision. Feldman, 460 U.S. at 482-84 n.16.

In this case, Flemings Thirteenth Amendment and equal protection arguments are so "inextricably intertwined" with the Virginia Supreme Court's decision that federal district court consideration of those issues would, in effect, constitute review of a final judgment of a state court. To decide if the Virginia court applied a different standard for Fleming than for white libel defendants the district court would have to second-guess the Virginia Supreme Court's interpretation of existing Virginia precedents and its application of such case law to the facts of the Fleming-Moore dispute. Such second-guessing would constitute impermissible appellate review of a state court decision.

Fleming cannot avoid the restrictions of the Rooker-Feldman doctrine by framing his challenge as civil rights actions against the state court justices,[7] the attorneys and the plaintiff in the original libel suit. See, e.g., Hale, 786 F.2d at 691 (federal district court had no jurisdiction to consider plaintiff's § 1983 action against ex-wife, her lawyer, and state judge who rendered divorce and child custody decree because such action was "inextricably intertwined" with the state court decision). The

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[7] By deciding this case on jurisdictional grounds we do not mean to intimate that judicial immunity is unavailable to protect the justices of the Virginia Supreme Court from this type of lawsuit. It is well established, and has been for many years, that judges acting within their judicial capacities enjoy absolute immunity from monetary damages, unless those jurists act in "clear absence of all jurisdiction." Stump v. Sparkman, 435 U.S. 349, 355-57 (1978); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872). Clearly, the justices of the Virginia Supreme Court had jurisdiction to decide the appeal of the libel judgment against Fleming.

appellant's argument that the defendants violated his constitutional rights is premised on the assumption that the Virginia Supreme Court wrongly decided the merits of Fleming's case, either as a matter of federal or of state law. Such a determination would require the district court to sit in appellate review of the Virginia Supreme Court decision.

In conclusion, this case represents an attempt by a litigant to obtain review of a state court judgment in a federal district court by framing it as a claim for violation of constitutional rights. Such an attempt flies in the face of the Rooker-Feldman doctrine and is merely a variation of a similar attempt this Court rejected three years ago in Fleming I, 780 F.2d 438. The district court properly dismissed this case for lack of subject matter jurisdiction.

Although we find Fleming's arguments

without merit, we decline to award attorneys fees and double costs to the appellees pursuant to our authority under Fed. R. App. P. 38. We cannot say that Fleming's jurisdictional arguments sank to the level of frivolousness.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

Filed:
July 22, 1987

| | | |
|---|---|---|
| JAMES N. FLEMING, | ) | |
| | ) | |
| Plaintiff, | ) | Civil Action |
| | ) | No. 87-0004-C |
| v. | ) | |
| | ) | |
| W. BEDFORD MOORE, III, | ) | |
| et al., | ) | |
| | ) | |
| Defendants. | ) | |

MEMORANDUM

This matter comes before the Court on defendants' motions to dismiss the instant action under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Having been fully briefed and argued, it is now

ripe for disposition.

Factual Background

The plaintiff, James N. Fleming, is a black real estate developer. The defendants are as follows: (1) W. Bedford Moore, III -- a white male who obtained a libel judgment against the plaintiff in the state court; (2) the present and retired Justices of the Virginia Supreme Court -- who have heard and ruled upon a variety of issues related to the Moore v. Fleming libel suit; (3) Judge Tremblay-- a former member of the law firm that represented Mr. Moore in his libel suit against the plaintiff; and (4) Messrs. Smith, Taggart, Gibson and Albro-- present members of the law firm that represented Mr. Moore in his libel suit.

The instant action arises out of an earlier state court libel suit brought by defendant Moore against the plaintiff. In that suit, the Albemarle County Circuit

Court found that Mr. Fleming had libelled Moore by publishing a letter in a Charlottesville newspaper, accusing Moore of opposing Fleming's proposed housing development on land adjoining Moore's because he did not want "any black people within his sight." On appeal, the Virginia Supreme Court affirmed Fleming's liability, but reversed the jury's damage award as excessive and remanded. On remand, the circuit court ordered remittitur and entered judgment for defendant in the sum of $233,333.34.

Since that time, plaintiff has unsuccessfully sought appellate review on several occasions before both the Virginia and United States Supreme Courts. He also has unsuccessfully filed certain collateral actions in both the Eastern and Western Districts of Virginia, alleging various constitutional violations in connection with the libel suit.

Plaintiff filed the instant action in the Western District on January 16, 1987, and filed his first amended complaint on February 5, 1987. By order dated March 27, 1987, the Western District judges recused themselves, and the case was assigned to the undersigned.

The instant action alleges violations of the Thirteenth Amendment; the Equal Protection clause of the Fourteenth Amendment; the Free Speech and Free Press Clauses of the Fourteenth Amendment; and 42 U.S.C. §§ 1981, 1983. In addition, plaintiff has sought leave to amend to add claims under 42 U.S.C. §§ 1985(3), 1986 and 1988.

In essence, plaintiff claims that the state libel suit judgment was an "incident of slavery" in violation of the Thirteenth Amendment because it penalizes a black person for speaking out against a white person, as traditionally occurred by

custom and statute. He next claims that his constitutional right to speak and publish his opinions has been infringed upon by this judgment, while the rights of white persons are not similarly infringed upon, in violation of the Equal Protection Clause.

1. Motion to Amend Complaint

As an initial matter, plaintiff has been granted permission to amend his complaint to add claims under 42 U.S.C. §§ 1985(3), 1986 and 1988, and they will be treated within the instant motion.

2. Motions to Dismiss

The Court finds, however, that it is without jurisdiction to hear the instant claims as, despite plaintiff's prostestations to the contrary, they fundamentally seek federal court review of a final state court judgment. See District Court of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) (federal district court

lacks jurisdiction to hear challenge to state court decision even if allegation that state court acted unconstitutionally). In addition, plaintiff seeks a permanent injunction against execution on the state court judgment -- a matter which also is outside of this Court's jurisdiction. The Court also notes several other flaws with plaintiff's complaint, which need not be fully addressed because of the Court's finding on jurisdiction, including judicial immunity and insufficient allegations to state an equal protection claim against the attorney defendants.

The fundamental flaw in plaintiff's complaint, however, is that once again plaintiff seeks federal court review of the state court's libel judgment. As the Supreme Court explicitly held in Feldman, supra, "United States district courts . . . do not have jurisdiction, however, over challenges to state court decisions in

particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in this Court." D.C. Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983).

Because what plaintiff seeks is federal court review of the state court's action in his particular case alleging its unconstitutionality, this Court is without jurisdiction, and his complaint must be dismissed.

An appropriate order shall issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date: 07/22/87

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 87-6619

JAMES W. FLEMING

Plaintiff - Appellant

v.

W. BEDFORD MOORE; E. GERALD TREMBLAY; LLOYD T. SMITH; JOHN K. TAGGART, III; MELVIN E. GIBSON, JR.; THOMAS E. ALBRO; HARRY LEE CARRICO, Chief Justice of the Supreme Court of Virginia; GEORGE MOFFETT COCHRAN, Justice of the Supreme Court of Virginia; RICHARD HARDING POFF, Justice of the Supreme Court of Virginia; ASBURY CHRISTIAN COMPTON, Justice of the Supreme Court of Virginia; ROSCOE BOLAR STEPHENSON, JR., Justice of the Supreme Court of Virginia; CHARLES STEVENS RUSSELL, Justice of the Supreme Court of Virginia: ALEXANDER MARKS HARMAN, JR., Senior Justice of the Supreme Court of Virginia; THOMAS CHRISTIAN GORDON, JR., Retired Justice of the Supreme Court of Virginia; WILLIAM CARRINGTON THOMPSON, Retired Justice

Defendant - Appellee

APPEAL FROM the United States District Court for the Western District of

Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ John M. Greacen
CLERK

FILED
JAN. 3, 1989
U.S. COURT OF APPEALS
FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-6619

FILED
JAN. 31, 1989
U.S. Court of
Appeals
Fourth Circuit

James W. Fleming

Plaintiff - Appellant

versus

W. Bedford Moore, et al

Defendants - Appellees

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On Petition for Rehearing with Suggestion for Rehearing In Banc.

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O R D E R

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Hall and Judge Chapman.

For the Court,

JOHN M. GREACEN
CLERK

STENOGRAPHIS REPORT of the hearing held in the case of James M. Fleming, Plaintiff, versus T. Bedford Moore, III, Defendant, Civil Action #87-4-C, and incidents thereof, as heard before the Honorable James C. Turk, Chief District Judge, in Lynchburg, Virginia on January 16, 1987.

APPEARANCES: S. W. Tucker, Esq.
Hill, Tucker & Marsh
P. O. Box 27363
Richmond, Virginia 23261

J. Benjamin Dick, Esq.
421 Park Street - Suite 2
Charlottesville, Virginia
22901

Counsel for Plaintiff

Thomas E. Albro, Esq.
M. E. Gibson, Jr., Esq.
Smith, Taggart, Gibson and Albro
105 - 109 East High Street
Charlottesville, Virginia
22901

Counsel for Defendant

* * *

MR. TUCKER: What I'm claiming is that the charge against Fleming was that he, as a black person, had spoken disparag --- or written disparagingly of a white person causing that person to be provoked, which was the same offense for which a slave would have been ---

THE COURT: I'm not sure. I don't have the motion for judgment. I'm not sure they even mention the fact that Mr. Fleming might be black.

MR. TUCKER: It does mention it.

THE COURT: It does?

MR. TUCKER: It does.

THE COURT: I don't know.

MR. TUCKER: The motion is --- The motion for judgment is Exhibit #2 attached to the complaint.

THE COURT: Okay.

MR. TUCKER: For our complaint under the Thirteenth Amendment, we do not have to show state action and we submit that

for our instant complaint claiming the denial of equal protection under the laws, that that was --- that that is where the-- where the state court in Fleming's case departed from long existing law, one of them founded deep in the Constitution and one founded deep in the common law, and has since made it clear by subsequent opinions that those departures from the common law are not a part of the law of Virginia. In other words, two (2) different rules of law were carved out for James Fleming in order to permit him to be punished for violating the slaves code-- the slave codes. And both of those exceptions were ---

THE COURT: But that isn't what, I mean, a jury found the publication to be libelous. I mean, I'm perfectly frank to say I agree with the dissent that Mr. Justice Albertis Harrison wrote in the case. I don't think it could be libelous

as a matter of law, but I can't, you know, put my judgment ahead of the judgment of the Virginia Supreme Court. And I think Mr. Fleming has been wronged. I'm not saying he's been wronged because he's a black person. That I do not know. I think that the -- I think the Virginia Supreme Court was wrong in not following the dissent of Albertis Harrison at the time because I think he was absolutely right. I do not think the publication was libelous. I think it was nothing but an expression of Mr. Fleming's opinion of Mr. Bedford --- of Mr. Moore. But I can't substitute my opinion for the other, I mean, for the other court's.

MR. TUCKER: That's not what we're asking. That's not what we're asking. Let's look at it this way. Certainly, if Judge Turk had been the Circuit Judge for the City of Albemarle, the County of Albemarle, when that case was first tried

the first motion to strike ---

THE COURT: Would have been granted by me if I had been the judge.

* * *

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-3506

FILED:
JAN. 22, 1987
U.S. Court Of
Appeals
Fourth Circuit

JAMES N. FLEMING,

Plaintiff-Appellant,

versus

W. BEDFORD MOORE, III,

Defendant-Appellee.

Appearances: S. W. Tucker, Esquire
B. Benjamin Dick, Esquire,
for Appellant.

Thomas E. Albro, Esquire,
submitted a memorandum via
telephone, for Appellee.

O R D E R

This is a motion for an injunction pending appeal or a stay of an order of the district court denying a temporary restraining order and preliminary injunction in a case filed to enjoin the collection of a final judgment of the Circuit Court of Albemarle County. The case has been here before, Fleming v. Moore, 780 F.2d 438 (4th Cir. 1985). It has been to the Supreme Court of Virginia twice[1], and petitions for certiorari have been denied by the United States Supreme Court on four occasions.[2]

The case arose out of a judgment for libel obtained by Moore, a white man, against Fleming, a black man, who had

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[1]Gazette v. Harris, 325 S.E.2d 713 (Va. 1985); Fleming v. Moore, 275 S.E.2d 632 (Va. 1981).

[2]Fleming v. Moore, No. 85-2168, cert. den. 55 U.S.L.W. 3258 (1986); Fleming v. Moore, No. 85-1532, cert. den. 54 U.S.L.W. 3697 (1986); Fleming v. Moore, No. 84-1740, cert. den. 53 U.S.L.W. 3895 (1985); Fleming v. Moore, No. 84-382, cert. den. 53 U.S.L.W. 3325 (1984).

published an advertisement in certain Charlottesville newspapers accusing the white man of racism. The judgment of the Circuit Court of Albemarle County became final when the Supreme Court of the United States denied the latest petition for certiorari October 14, 1986, rehearing denied December 8, 1986.

Fleming now says that the judgment of the state court was in violation of the Thirteenth Amendment to the Constitution because it is claimed it gives effect to an 1840 Virginia statute, reenacted in 1860, making it a crime for a black man to use provoking language to a white man. It is claimed that this is a badge of slavery, which, of course, it is.

It is also claimed by Fleming that the Virginia Supreme Court has been inconsistent in its decisions with respect to the proof required for monetary damages in cases of libel and slander, as well as

in its construction of the Virginia Constitution on freedom of expression, Va. Const. Art. I 12, and that such inconsistencies deny to Fleming the equal protection of the laws simply by virtue of being inconsistent since that has worked to Fleming's disadvantage in this case. They add that it is more than coincidence that the Fleming is black [sic].

The Thirteenth Amendment question could have been raised in the case from its very beginning, yet it has never been raised until the complaint in the instant and latest case was filed in the district court.

The question concerning equal protection of the laws, even if there has been a mistake, is simply an error of state law.

In these circumstances, I am of opinion the district court was correct in its holding that it did not have

jurisdiction to enjoin the collection of this state judgment. The case is indistinguishable from Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), in which the court described a similar attempt as being an exercise of appellate jurisdiction. p.416. The reasoning of Rooker has been more recently affirmed in D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983), where the court stated that the District of Columbia District Court was without authority to review final determinations of the District of Columbia Court of Appeals in judicial proceedings and that review of such proceedings could be obtained only in the Supreme Court. The case cited Rooker for its authority. p. 476.

The defendant relies principally on Simon v. Southern Ry., 236 U.S. 492 (1915), which holds that a federal court may set aside a judgment of a state court

obtained without jurisdiction. That is simply not this case.

In conclusion, I feel there is little likelihood that Fleming will prevail on appeal. I also do not feel that the public interest requires that a stay be issued in this case. The instant case is not different in any great respect from this case the last time it was before us. There, a First Amendment right was being used to collaterally attack what is essentially the same state court judgment. Here, it is the Thirteenth and Fourteenth Amendments which Fleming seeks to use in attacking the state court judgment. We said in that case that "Fleming's sole possible federal remedy" is in the United States Supreme Court. I think this case is not different. I do not think there is any more irreparable injury than exists in the payment of any other final judgment.

It is accordingly ADJUDGED and

ORDERED that the motion for an injunction or stay pending appeal shall be, and the same thereby is, denied.

The attorneys objected to every adverse ruling in this order which would be sustained by the record.

Enter this 19th day of January 1987.

/s/ H. E. Widener, Jr.

H. E. Widener, Jr.

United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Charlottesville Division

| | |
|---|---|
| JAMES N. FLEMING<br>304-A Ridge Street<br>Charlottesville, VA 22901<br><br>Plaintiff,<br>vs.<br><br>W. BEDFORD MOORE, III<br>Shack Mountain<br>Route 5, Lamb's Road<br>Star Route 657<br>Charlottesville, VA 22901<br><br>E. GERALD TREMBLAY<br>Charlottesville, VA<br><br>LLOYD T. SMITH<br>105-109 East High Street<br>Charlottesville, VA 22901<br><br>JOHN K. TAGGART, III<br>105-109 East High Street<br>Charlottesville, VA 22901<br><br>MELVIN E. GIBSON, JR.<br>105-109 East High Street<br>Charlottesville, VA 22901<br><br>THOMAS E. ALBRO<br>105-109 East High Street<br>Charlottesville, VA 22901<br><br>HON. HARRY LEE CARRICO<br>Chief Justice of the<br>Supreme Court of Virginia<br>101 North 8th Street<br>Richmond, VA 23219 | CIVIL ACTION<br><br>NO. 87-0004-C<br><br>Clerk's Office<br>U.S. Dist.<br>Court<br>FILED:<br>Feb. 5, 1987<br>Joyce F. Witt,<br>Clerk<br>By s/V. Harris<br>Deputy Clerk |

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Staunton, VA 24401

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101 North 8th Street
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HON. WILLIAM CARRINGTON THOMPSON, Retired Justice
400 Masonic Temple
Danville, VA 24541,

Defendants.

AMENDED AND SUPPLEMENTAL COMPLAINT

Preliminary Statements

1. This action is for redress of unconstitutional abuse of state power for the purpose and with the effect of depriving the plaintiff, solely because of his race and color, (1) of his right pursuant to the Thirteenth Amendment to be free from all badges and incidents of chattel slavery, (2) of his right pursuant to the First and Fourteenth Amendments to freedom of speech and of the press, and (3) of his right pursuant to the Fourteenth Amendment not to be denied the equal protection of the Constitution and laws of the Commonwealth of Virginia.

2. Plaintiff seeks an adjudication that the judgment of the Circuit Court of

the County of Albemarle entered against him on 13 May 1985 in an action for alleged defamation commenced on 3 January 1977 by W. Bedford Moore, III, violates the Constitution of the United States, specifically the Thirteenth Amendment, the Freedom of Speech and Press provisions of the First Amendment as protected against state abridgement by the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment. The publication on which the judgment is based, hereto attached as PX 1, is incorporated herein by this reference. Of and concerning the defendant who then was and for 14 months had been opposing Fleming's application for re-zoning to permit a low cost housing development on property adjoining the defendant's residential estate, Fleming wrote:

> "[A] man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them, * * * Bedford Moore

> . . . does not want any black people within his sight."

Plaintiff alleges that said judgment inflicts a punishment upon him, a Negro, solely for his use of provoking language to or concerning a white person which, as an incident of slavery imposed by custom and by statute prior to the adoption of the Thirteenth Amendment, a Negro was forbidden to do. Further, the plaintiff seeks recovery of damages as herein shown and injunctive relief against the imminent execution on said judgment and against any further steps to enforce payment thereof.

3. In an action which this court dismissed by order entered 27 March 1985 (Fleming v. Moore, C.A. #84-0042-C), the defamation judgment was alleged to be in violation of the First and Fourteenth Amendments. This court disavowed "appellate" jurisdiction to correct an apparent injustice done in the state courts. The court of appeals affirmed the

order of dismissal for perceived absence of state action to support federal jurisdiction under the Fourteenth Amendment. Fleming v. Moore, 780 F.2d 438 (4th Cir. 1985), cert. denied (No. 85-1532).

4. Not until 6 September 1985 (when the Supreme Court of Virginia decided two defamation cases in which no Negro was involved) did it become apparent that, in cases involving white persons, the rights, privileges and immunities which had always been enjoyed by white inhabitants of the Commonwealth would not be curtailed or otherwise adversely affected by anything decided or written by the Supreme Court of Virginia in its opinion in the first appeal of the defamation action, Fleming v. Moore, 221 Va. 884, 275 S.E.2d 634 (1981) (Fleming I). The violation of the Thirteenth Amendment herein demonstrated and the

concomitant violation of the Equal Protection Clause of the Fourteenth Amendment have not been previously charged in any proceeding in any court.

Jurisdiction

5. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 2201 and, further, under Title 28 United States Code, Sections 1331 and 1343(a). This is an action for a declaratory judgment determining a question in actual controversy between the parties, for recovery of damages, and for injunctive relief. This action arises under Article Six, Section Two, under the Thirteenth Amendment, under the First and Fourteenth Amendments, and under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and under Title 42, United States Code, Sections 1981, 1983, 1985(3), 1986 and 1988.

Justiciable Controversy

6. In an action for alleged defamation, W. Bedford Moore, III (defendant herein) has a purported final judgment against James N. Fleming (plaintiff herein) for the sum of $233,333.34 with interest thereon at the rate of 12% per annum from 13 May 1985; and, except as is hereinafter shown, payment thereof is secured by appeal bonds with liquidatable surety in sums aggregating $258,700. The instant plaintiff, Fleming, contends that the purported judgment is unconstitutional and, hence, a nullity.

The Parties

7. Plaintiff is a Negro or black person and a descendant of slaves, was born in Albemarle County, Virginia, resides in the City of Charlottesville, Virginia, and throughout his life has performed and executed the duties and

responsibilities of citizenship of his state and nation, including service in the armed forces of this nation in the Korean conflict. All other parties to this action are Caucasians or white persons.

8. Prior to his appointment and qualification as one the judges of the Sixteenth Judicial Circuit of Virginia which includes the City of Charlottesville and the surrounding County of Albemarle, the defendant E. GERALD TREMBLAY was a partner in the Charlottesville law firm then known as Tremblay and Smith which is presently known as Smith, Taggart, Gibson & Albro. The defendants LLOYD T. SMITH, JOHN K. TAGGART, III, MELVIN E. GIBSON, JR., and THOMAS E. ALBRO are the present partners and members of said law firm. Each of said defendants, as a condition of his qualification as an attorney-at-law, swore that he would support the Constitution of the United States. As

attorneys at law all of said defendants have counseled with and represented the defendant W. BEDFORD MOORE, III, in the above mentioned action for alleged defamation and have consulted with each other with respect to that representation; and the defendant TREMBLAY was lead counsel for Moore in the first trial of said action. The defendants named in this paragraph will sometimes be referred to as the defendant attorneys and their client.

9. In their considerations of the said action for alleged defamation, the defendant attorneys and their client resolved to file and prosecute said action for alleged defamation and thereby to injure and oppress James N. Fleming solely because he, a black person, had exercised his right and privilege, secured to him by the Constitution and laws of the United States, to write and publish his pure expression of opinion, however ill

founded, concerning the motivation of his white opponent in the zoning controversy, as freely and as much without inhibition by action for libel or slander as in Virginia white citizens have had the right and privilege to do since the earliest days of the Commonwealth.

10. The defendants the Honorable Chief Justice HARRY LEE CARRICO, and the Honorable Justices GEORGE MOFFETT COCHRAN, RICHARD HARDING POFF, ASBURY CHRISTIAN COMPTON, ROSCOE BOLAR STEPHENSON, JR., CHARLES STEVENS RUSSELL, ALEXANDER MARKS HARMAN, JR., THOMAS CHRISTIAN GORDON, JR., and WILLIAM CARRINGTON THOMPSON, sometimes hereinafter referred to as defendant justices, are or at varying times during the pendency of the action for alleged defamation were Justices of the Supreme Court of Virginia; and they or varying combinations of four or more of them have constituted a majority of that court in

its two opinions and corresponding judgments on appeal of the said action for alleged defamation; and varying combinations of three of them have entered or concurred in the entry of orders granting, limiting, or denying Fleming's petitions for appeal to that court or his petition for rehearing.

11. In their consideration of Fleming's first appeal, the five defendant justices first named resolved to and did remand the litigation for a second trial and thereby and otherwise made possible the punishment, injury and oppression of James N. Fleming solely because he, a black person, had dared to exercise his right and privilege, secured to him by the Constitution and laws of the United States and by the Constitution of Virginia as well, to write and publish his pure expression of opinion, however ill founded, concerning the motivation of his

white opponent in the zoning controversy, and to do so as freely and as much without inhibition by action for libel or slander as in Virginia white citizens have had the right and privilege to do since the earliest days of the Commonwealth.

12. In the order granting Fleming's second appeal, entered following an oral presentation before three of the defendant justices, the Supreme Court of Virginia rejected consideration or reconsideration of Fleming's claim that his publication was an absolutely privileged expression of opinion under the First Amendment and his claim that summary judgment in his favor should have been entered for the failure of the plaintiff in the action for alleged libel to prove special damages.

13. Following the refusal of the Supreme Court of Virginia to allow Fleming a third appeal, that court, or a panel of three of the defendant justices, denied

Fleming's timely petition for rehearing and thereby refused to conform the judgment in the libel action against Fleming to its holdings, published after Fleming's third petition for appeal had been filed, (1) that the First Amendment to the Federal Constitution and article 1, section 12 of the Constitution of Virginia protect the right of the people to teach, preach, write, or speak any opinion (not amounting to "fighting words"), however ill-founded, without inhibition by actions for libel and slander and (2) that it is for the court, not the jury, to determine as a matter of law whether an allegedly libellous statement is one of fact or one of opinion.

Incidents And Badges Of Slavery In The Land Of The Free; And Vestiges Thereof

14. Before the Federal Constitution was ordained and established, the citizens of Virginia had enshrined in their Bill of Rights "as the basis and foundation of

government * * *

> "12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments."

The constitutional convention of 1867 proposed, and the voters of Virginia subsequently adopted, this addition:

> "and any citizen may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

The convention which produced the Constitution of Virginia of 1902 inserted the adverb "freely" immediately before "speak, write and publish". As revised in 1971, the Constitution of Virginia, in section 12 of article I (Bill of Rights), provides:

> That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people

> peaceably to assemble, and to petition the government for the redress of grievances.

15. Prior to the adoption of the Thirteenth Amendment, the plaintiff's ancestors, and all other inhabitants of Virginia who were of the plaintiff's race and color, were excluded by custom and by law from the rank of citizen of Virginia; and by custom and by law they were denied freedom of the press or any other freedom which would be inconsistent with their subjugation. The social climate then prevailing is illustrated by a section of a statute enacted by the General Assembly of Virginia in the 1847-8 Session and carried over into the Code of Virginia 1860 as Section 11 of Chapter 200 (OFFENSES BY NEGROES), viz:

> "A negro shall be punished with stripes: First, If he use provoking language or menacing gestures to a white person; * * *."

16. Within the memory of persons now living, white citizens generally have

resented speech by a black person when delivered in a manner characterized by them as impudent; and for such impudence black citizens have been visited with violence and other public displays of hostility. Social institutions and conventions taught many Negroes to be humble, subservient, and as reverentially respectful to white persons as their forebears were required to be; and those social institutions and conventions have taught many white persons, particularly in Albemarle County, to expect Negroes to be that way and to resent Negroes who are not.

17. No single individual could have been more qualified to make assessment of the attitude of white citizens of Albemarle County toward black people than Bernard Chamberlain, Esquire a life long resident of the county and an attorney practicing there since 1922. During the

October, 1982 re-trial of the defamation action, upon being asked on direct examination by counsel for the plaintiff therein (Moore) if, in his twenty-five years of intimate acquaintance, he had heard Professor Moore say anything degrading about black people, Attorney Chamberlain answered in these words: "I never have; strange thing, I never have."

18. On November 18, 1977 a jury of white citizens of that county, impaneled to try only the issue of damages, made awards of a mere $18,000 in an action for wrongful death against two white men, one of whom had shot and killed the unarmed 23 year old black man who was fleeing from them. Lane v. Scott, 220 Va. 578, 260 S.E.2d 238 (1979), cert denied, 446 U.S. 986 (1980). Exactly eighteen days later, a jury of white citizens of that county returned a verdict for the plaintiff in an action for libel and awarded damages

against the black defendant totaling $110,000 upon pleading and proof that the defendant, "a member of the black race", had published an advertisement (PX-1 herewith) of and concerning plaintiff, " a member of the white race", and that on account thereof "the plaintiff has been greatly insulted, mortified, held up to ridicule, humiliated, and aggrieved." A copy of the body of the motion for judgment in the action for libel, as set out in the Supreme Court of Virginia Record No. 78-1061 at pages 1 and 2 of the Appendix, is herewith filed, marked PX-2.

19. On retrial of the defamation action on October 12, 1982 the plaintiff in that action (Moore) peremptorily struck from the venire the only two black citizens who were found free from exception and then, when testifying, appealed to the propensities and proclivities of the jurors in these words:

> "I felt that he had put a gap in my honor that could only be restored by vindication of my fellow citizens on this jury." Fleming v. Moore, sub nom, The Gazette v. Harris, 229 Va. 1, 47, 325 S.E.2d 713, 744 (1985), cert. denied (No. 84-382); cert. denied (No. 84-1740); cert. denied (No. 85-2168), rehearing denied December 8, 1986.

That jury responded to the plea for vindication by finding for the plaintiff and making awards of $100,000 for compensatory damages and $250,000 for punitive damages and interest on the $250,000 award at the rate of 12% a year from January 15, 1976--the date of the publication. The appellate court held, and here the plaintiff alleges, that the compensatory damage award of $100,000 was "not the product of a fair and impartial decision" and that the punitive damage award of $250,000 "on its face indicates prejudice or partiality." (229 Va. at 48, 51; 325 S.E.2d at 745, 747).

20. A copy of the final judgment of the Circuit Court of the County of

Albemarle, as entered on 13 May 1985 following remittitur proceedings, is herewith filed, marked PX-3. The Supreme Court of Virginia refused appeal from that judgment and the Supreme Court of the United States denied petition for writ of certiorari and denied petition for rehearing.

Freedom Of The Press Did Not Avail The Black Defendant

21. The Virginia courts turned deaf ears to the black defendant's protestations that he had a constitutional privilege to publish his opinion concerning the professed motivation of his white opponent in the on-going zoning controversy. In Fleming I, the appellant argued:

> "The article authored by Fleming appearing in the Cavalier Daily on January 15th and 16th, 1976 was constitutionally protected speech. It was not per se libelous, by any definition, of Professor Moore and the Court committed reversible error in allowing the case to be presented to a jury over Fleming's well put

> motion to test the sufficiency of the claim." (Supreme Court of Virginia Record No. 78-1061 - Brief of Appellant, page 20.)

22. In Fleming I, the court correctly held "that the trial court erred in ruling that Fleming's advertisement was defamatory per se" (221 Va. at 891; 275 S.E.2d at 636); and then the court went on to "resolve other issues that otherwise may arise again upon retrial." Focusing on Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (and making no mention of section 12 of article I (Bill of Rights) of the Constitution of Virginia), the Supreme Court of Virginia held: "Since Fleming is not a media defendant and Moore is not a public figure, Gertz does not control." (221 Va. at 893; 275 S.E.2d at 638.) Except for the dissenting opinion of Justice Harrison who would have entered final judgment for the defendant, there is no recognition in Fleming I of the defendant's claim of absolute

constitutional privilege. By its silence on the point of privilege, the appellate court indicated its approval of punishment of the "black" realtor whose publication had provoked a "white" university professor.

23. In Fleming II, one of the questions presented in the petition for appeal was -

> "(A) Was the advertisement an absolutely privileged expression of opinion under the First Amendment?"

In discussing what standard might be set for an alleged libel by a private individual published in a newspaper on a matter of public concern, the petition for appeal noted that Article 12 of Virginia's Bill of Rights "is no less soaring than its federal counterpart." The state appellate court refused to entertain the question of constitutional privilege.

24. Seven months after the Virginia court decided Fleming II, it decided a

case (Chaves v. Johnson, 230 Va. 112, 335 S.E.2d 97 (1985)) the facts in which did not suggest analogy with the punishment of a Negro for using provoking language to or concerning a white person. In a letter to the members of the Council of the City of Fredricksburg, Johnson, an architect, had charged (1) that his competitor, Chaves, "has had no prior experience in this type of project" and (2) that council had "agree[d] to pay [to Chaves] an Architectural fee that is over 50% more than what could be considered a reasonable fee." In Chaves' ensuant action for damages, the trial court set aside the verdict for the plaintiff on the defamation count, "on the grounds that Johnson's statements were mere statements of opinion." (230 Va. at 118; 335 S.E.2d at 101).

The Supreme Court of Virginia affirmed, saying:

"Pure expressions of opinion, not amounting to 'fighting words,' cannot form the basis of an action for defamation. The First Amendment to the Federal Constitution and article 1, section 12 of the Constitution of Virginia protect the right of the people to teach, preach, write, or speak any such opinion, however ill-founded, without inhibition by actions for libel and slander. '[E]rror of opinion may be tolerated where reason is left free to combat it.' Thomas Jefferson's First Inaugural Address (1801). 'However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.' Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).

"It is for the court not the jury, to determine as a matter of law whether an allegedly libelous statement is one of fact or one of opinion. * * *" (230 Va. at 119, 335 S.E.2d at 101-2 (1985)).

25. That which was written and published by Fleming of and concerning Moore is more readily seen as pure expression of opinion than that which was written and published by Johnson of and concerning Chaves. The only basis for distinction between Chaves v. Johnson and

the Fleming cases is that the Fleming cases suggest and permit analogy with the punishment of a Negro for his use of language which provoked a white person.

For Fleming's Case Only,
The Common Law Was Tortured

26. In Fleming I, the court held that the trial court had erred in ruling that Fleming's advertisement was defamatory per se. With respect to recovery of damages in actions for libel per quod, the settled law in Virginia was stated by its highest court in Moseley v. Moss, 47 Va. (6 Gratt.) 534, 538 (1850), viz:

> "The common law does not give reparation for all derogatory or disparaging words. To make such words actionable, unless special damages be shewn, they must impute some offence against the law, punishable criminally; or the having a contagious disorder tending to exclude from society; or which may affect one injuriously in his office or trust, or in his trade, profession or occupation; or which, in the case of a libel or written slander, tend to make the party subject to disgrace, ridicule or contempt. Words spoken that are merely vituperative, or insulting,

> or imputing only disorderly or immoral conduct, or ignoble habits, propensities or inclinations, or the want of delicacy, refinement or good breeding, are not regarded by the common law as sufficiently substantial to be treated as injuries calling for redress in damages." (emphasis added).

That doctrine was followed in M. Rosenburg & Sons v. Craft, 182 Va. 182, 29 S.E.2d 375, 151 A.L.R. 1095 (1944) and in Shupe v. Rose's Stores, 213 Va. 374, 192 S.E.2d 776 (1972). In Shupe, the court was urged to overrule its earlier holdings that where the alleged defamatory language is not actionable per se and there were no allegations or proof of special damages, the trial court had properly dismissed the action; and the court responded: "We know of no logical reason for overruling those cases and decline to do so." (213 Va. at 376, 192 S.E.2d at 767).

27. In his defamation action against Fleming, Moore's only allegation of damages was that

> "on account of said libel, the plaintiff has been greatly insulted, mortified, held up to ridicule, humiliated, aggrieved, and has sustained and is entitled to recover general and punitive damages." (PX-2)

28. The evidence in support of that allegation is limited to Moore's testimony that, on occasion, he was insulted, ridiculed, mortified, upset, embarrassed, etc., and, as quoted in Fleming II: "I felt that he had put a gap in my honor."

29. In Fleming I, the appellant argued: "It is clear that in order for W. Bedford Moore, III, to prevail the article published by Fleming must be either libelous per se or its publication must have occasioned a special loss, which Moore must have properly plead and proved in his evidence. See Rosenberg and Sons v. Craft, 182 Va. 512, 29 S.E.2d 375." (Supreme Court of Virginia Record No. 78-1061 - Brief of Appellant, page 20).

30. In Fleming I, we read:

> "Moore did not allege or prove that he suffered any monetary loss. He did allege, however, that he had been insulted, mortified, held up to ridicule, and humiliated by the statement. * * * To the extent that language in Shupe may be construed to indicate that emotional upset and embarrassment cannot constitute 'special damages', it is hereby modified." (211 Va. at 894; 275 S.E.2d at 639).

31. The court did not indicate what in Fleming's case was the "logical reason", absent from its earlier cases, for not following the long standing decisions requiring proof of special damages in actions for defamation per quod. In the penultimate paragraph of its opinion in Fleming I, the court removed a common law obstacle to the infliction of punishment for Fleming's provoking language concerning a white person by "modifying" the concept of "special damages" which, until Fleming I, was universally considered as meaning the loss of some tangible thing of objectively determinable value.

32. Seven months after the decision in Fleming II, the court decided Great Coastal Express v. Ellington, 230 Va. 142, 334 S.E.2d 846 (1985) and, in so doing, upheld the ruling of the trial court that commercial bribery (a Class III misdemeanor punishable by a fine) was a criminal offense involving moral turpitude and, hence, that an accusation of commercial bribery was defamation per se. The appellant was upheld in its argument "that damages for embarrassment and humiliation would be presumed without proof of pecuniary loss." (230 Va. at 146; 334 S.E.2d at 849). Without so saying, the court repudiated the tortured reasoning in the penultimate paragraph of Fleming I by stating, obiter dictum, the reason why, in cases of alleged defamation per quod, the plaintiff must plead and prove pecuniary loss, viz:

> "It is difficult, if not impossible, to prove with mathematical precision

> the quantum of damages for injury to reputation, humilation, and embarrassment which may flow from a defamation. For this reason, the common law, as early as 1670, modified the usual standard of proof of damages in those cases where the words uttered were actionable per se." (230 Va. at 148; 334 S.E.2d at 850)

Thus the notion expressed in Fleming I, that "'special damages' . . . are not to be limited to pecuniary loss", has been limited to an action based upon a Negro's use of provoking language to or concerning a white person.

No Other Remedy Is Available

33. By order of 24 January 1986 the Supreme Court of Virginia refused the instant plaintiff's (Fleming's) 13 August 1985 petition for appeal from the 13 May 1985 final judgment order of the Circuit Court of the County of Albemarle (PX-3). Thereupon, on 30 January 1986, Fleming filed a petition for rehearing wherein, inter alia, he called the attention of the court to its 6 September 1985 decision in

Chaves v. Johnson (supra), in which (as in Fleming I) there was neither public figure nor media defendant; and he argued that, his case being indistinguishable from Chaves, the court should terminate the defamation litigation by an entry of final judgment for the defendant therein. Rehearing was denied on 7 March 1986.

34. Plaintiff (Fleming) petitioned the Supreme Court of the United States for a writ of certiorari, tendering questions arising under the First Amendment and, also, suggesting that its recent decision concerning racial discrimination in jury selection in criminal cases should be extended to civil cases in which racial issues are involved. By timely petition for rehearing, following denial of certiorari, he sought remand of the case to the Supreme Court of Virginia for reconsideration in the light of its 6 September 1985 opinions in Great Coastal

Express v. Ellington (supra) and in Chaves v. Johnson (supra). Rehearing was denied.

Irreparable Injury And Compensable Damages

35. From the first time a judge of the Circuit Court of the County of Albemarle ruled that the subject publication was not constitutionally privileged expression of opinion, the plaintiff has been and continues to be irreparably injured by being denied the rights of speech and press which all American citizens and, particularly, all citizens of Virginia enjoy. Such irreparable injury is exacerbated by the circumstance that the constitutional privilege is denied him solely because he, a black person, wrote uncomplimentarily of and concerning a white person. Such irreparable injury will continue until a court of the United States having jurisdiction in the premises will have adjudged and ruled that the subject

publication was pure expression of opinion within constitutional protection of freedom of speech and press, which could not lawfully have been denied to the plaintiff because of his race, or because of the race of any person of or concerning whom any part of it was written, or for any other reason.

36. At all times during the pendency of the defamation litigation, and particularly upon and after the failure and refusal of the Supreme Court of Virginia on 6 March 1981 to give effect to his constitutional privilege as the dissenting Justice Albertis Sydney Harrison, Jr., would have done, the plaintiff, Fleming, has endured and continues to endure mental anguish of the greatest conceivable severity as a result of the denial, solely because of race, of his right as a citizen of the United States and of the Commonwealth of Virginia to

freely express his opinion contradicting the professedly altruistic motivations of his opponent in a then on-going zoning controversy. Moreover, in his defense of the defamation litigation for a decade, the plaintiff, Fleming, has incurred enormous expense. And because the defendants have, and each of them has, knowingly and wilfully inflicted injury and oppression upon the plaintiff, solely because of race and in violation of the Thirteenth Amendment, the plaintiff claims and is entitled to recover punitive damages.

37. Plaintiff is informed and alleges that upon sight draft of the defendant W. Bedford Moore, III, dated January 16, 1987, drawn under the irrevocable letter of credit securing plaintiff's appeal bond filed on June 11, 1985 in the Clerk's Office of the Circuit Court of Albemarle County, Albemarle Bank & Trust Co. on January 20, 1987 delivered to

the defendant Moore the sum of $233,000. Unless injunctive relief as is herein prayed will be granted, the defendant Moore will cause to be liquidated a certificate of deposit of the principal sum of $25,700 with interest thereon accrued which stands as security on the plaintiff's additional bond in the defamation action, and said defendant will cause execution to be issued against other properties of the plaintiff and will take other steps in further enforcement of the judgment.

38. Moreover, there is yet pending in the Circuit Court of the City of Charlottesville an action for alleged defamation styled W. Bedford Moore, III, plaintiff vs. James N. Fleming, defendant, based upon the appearance of the subject advertisement (PX-1) in a newspaper published in the City of Charlottesville. A copy of the motion for judgment in that

action is herewith filed, marked PX-4.

WHEREFORE, plaintiff prays:

(a) That the court will advance this case on the docket and order a speedy hearing at the earliest practicable date;

(b) That the court will adjudge and declare (1) that in the action commenced on January 3, 1977 in the Circuit Court of the County of Albemarle by W. Bedford Moore, III against James N. Fleming, the very essence of the motion for judgment is a charge that a black person wrote and caused to be published an advertisement protesting racism and, in so doing, made a pure expression of opinion concerning the motivation of a white person therein named who then was opposing Fleming's application for re-zoning and who thereby was "greatly insulted, mortified, held up to ridicule, humiliated, and aggrieved"; (2) that such charge is analogous to a prosecution for the use by a Negro of

provoking language to a white person which, prior to the ratification of the Thirteenth Amendment to the Constitution, would have been a violation of an Act of the General Assembly of Virginia passed at its 1847-8 session and carried over into the 1860 Code of Virginia as one of the proscribed offenses by Negroes; (3) that the conduct of such action in a court of law, subjecting the defendant therein to punishment, penalties, and exactions to which white citizens are not subjected, was a vestige of slavery, impermissible under the Thirteenth Amendment; (4) that the Thirteenth Amendment and 42 U.S.C. 1981 obviously preclude jurisdiction in any court, state or federal, to reduce any person to slavery or to impose a badge or incident of slavery upon any black person; (5) that the denial by the Circuit Court of the County of Albemarle and the Supreme Court of Virginia to James N. Fleming of

the right, secured in section 12 of article I (Bill of Rights) of the Constitution of Virginia, to speak, write, and publish his sentiments and opinion, however ill founded, in his advertisement protesting racism, as freely and without inhibition by actions for libel and slander as was subsequently accorded the white defendant in Chaves v. Johnson, 230 Va 112 (1985), violated the First and Fourteenth Amendments' guaranty of freedom of speech and of the press and, also, the Equal Protection Clause of the Fourteenth Amendment; (6) that the Thirteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment were offended by the denial by the Circuit Court of the County of Albemarle and the Supreme Court of Virginia of the benefit of the common law requirement of allegation and proof of monetary loss or other measurable special damages in an action for defamation per

quod, the viability of which common-law requirement was subsequently recognized in Great Coastal Express v. Ellington, 230 Va. 142 (1985); and (7) that the final judgment of the Circuit Court of the County of Albemarle entered on 13 May 1985 in the action styled W. Bedford Moore, III v. James N. Fleming is unconstitutional, null, and void;

(c) That the court will permanently enjoin and restrain the defendant, W. Bedford Moore, III, from causing execution to be issued upon, or otherwise taking steps to enforce payment of the judgment of the Circuit Court of the County of Albemarle entered on 13 May 1985 in the action styled W. Bedford Moore, III v. James N. Fleming;

(d) That the plaintiff recover against the defendants jointly and severally, compensatory damages in the sum of $750,000 and punitive damages in the

sum of $250,000; and

(e) That the plaintiff will have such other and further relief as is just.

/s/ James N. Fleming
James N. Fleming

/s/ S. W. Tucker
S. W. TUCKER
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Of Counsel for Plaintiff

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(804) 977-6608

Of Counsel for Plaintiff

[Verfication Omitted]

[PX-1]

The Cavalier Daily, University of Virginia, Charlottesville, Friday, January 16, 1976

R A C I S M

I have endeavored to realize the opportunity to provide housing and pleasant surroundings for working people-the sort of people who made this the great country that it is.

I do not expect any Farmington members to buy my houses. The tenured position-holders who live off the public dole at the expense of the working people are already well-housed, and could not be expected to live in a racially-integrated neighborhood, anyhow.

There is a great deal of irony in the fact that here in Mr. Jefferson's country 200 years after his vision of situating his beloved Monticello upon the hill-top overlooking the developing community we have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of little Monticello does not want any black people within his sight.

There is a great conflict waging between the haves and the have-nots. Obviously we have created too much financial security for the tenured segment of the economic community whose greed is repeatedly shown by their expression of -

"I've got mine - too bad about you".

I am a lover of liberty and freedom of opportunity. I cannot stand by and see the have-nots oppressed by the no-growth people who are living off of our work. I know that this Country did not achieve the highest living standard in the world by no-growth or by oppression of the working man, and yet today the opportunity to improve one's living standard is being violently opposed by the same people who oppose my proposed neighborhood.

Pollution of the reservoir is being used as the current excuse to foster no-growth. The solution, of course, is to remove the guaranteed incomes of these greedy people and put them in the position of seeing the world through the eyes of one seeking the opportunity to improve his or her living standard. Only then would they admit that the pollution excuse is a sham.

I will develop Evergreen, and a lot of people will benefit from it.

Signed: JAMES N. FLEMING

Advertisement

V I R G I N I A :

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

| | | |
|---|---|---|
| W. BEDFORD MOORE, III, Plaintiff, | ) | |
| v. | ) | At Law No. 976-L |
| JAMES N. FLEMING, Defendant. | ) | [Filed 3 Jan. 1977] |

[PX 2]

MOTION FOR JUDGMENT

To the Honorable David F. Berry, Judge of Said Court:

Comes now the plaintiff, W. Bedford Moore, III, by counsel, and respectfully moves this Court for judgment against the defendant, James N. Fleming, and in support of his motion states the following:

1. At all times mentioned herein, W. Bedford Moore, III, has been a private citizen residing at "Shack Mountain" in a racially integrated area of Albemarle County, Virginia. Plaintiff is a member of the white race and is a professor at

the University of Virginia.

2. At all times mentioned herein, James N. Fleming has been a real estate developer engaged in the development of a proposed residential subdivision known as "Evergreen" which abuts the "Shack Mountain" property owned by the plaintiff. James N. Fleming is a member of the black race.

3. From time to time since the latter part of 1974, plaintiff has exercised his constitutional rights as a citizen to raise issues before governmental agencies of the County of Albemarle concerning the environmental impact of "Evergreen" on the Albemarle-Charlottesville Reservoir and the surrounding area, including "Shack Mountain." At no time have any of plaintiff's efforts in this regard been motivated by concerns relating to race or to the defendant personally.

4. On January 15 and 16, 1976, defendant wrongfully, willfully, maliciously and injurisouly published a certain false, scandalous, malicious, insulting and defamatory libel of and concerning plaintiff, purporting to have been written by defendant, in a certain daily newspaper of general circulation known as "The Cavalier Daily", published and circulated in the County of Albemarle and the surrounding area, having a circulation of approximately 15,000 copies. This false, scandalous, defamatory, insulting and libelous matter was printed in the form of an advertisement entitled "RACISM" a copy of which is attached hereto as Exhibit "A" and prayed to be read as a part of this pleading. This libelous matter was communicated, conveyed, and made known by the defendant to the plaintiff and divers other persons in Albemarle County and the

surrounding area.

5. These false, scandalous, malicious, defamatory and insulting words are, from their usual construction and common acceptance, insults and tend to violence and breach of the peace.

WHEREFORE, on account of said libel, the plaintiff has been greatly insulted, mortified, held up to ridicule, humiliated, aggrieved, and has sustained and is entitled to recover general and punitive damages, and plaintiff demands recovery from the defendant in the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) for general damages, and the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) for punitive damages, together with his attorneys' fees and the costs of this action.

Trial by jury is demanded.

W. BEDFORD MOORE, III

By counsel

[PX 3]

FINAL JUDGMENT ORDER

On April 16, 1985 came the parties, by counsel, pursuant to the mandate of the Supreme Court of Virginia in Record Number 831446 dated February 1, 1985, in which this case was remanded to the Circuit Court of Albemarle County for further proceedings consistent with the written opinion of the Supreme Court. In that opinion, the Supreme Court of Virginia affirmed the compensatory and punitive liability of James N. Fleming ("Fleming") but reversed both damage awards as excessive. The Supreme Court of Virginia directed this Court to require W. Bedford Moore, III ("Moore") to remit a "substantial part" of his compensatory award and a "substantial part" of his punitive award, or else submit to a new trial on the issue of damages only.

For the reasons stated by this Court

from the bench at the conclusion of the argument of counsel, the transcript of which hearing is hereby made a part of the record, it is ADJUDGED, ORDERED and DECREED that Moore shall submit to a new trial on the issue of damages only or shall remit one-third of the compensatory damage award of $100,000 and one-third of the punitive damage award of $250,000, resulting in a compensatory damage award of $66,666.67 and a punitive damage award of $166,666.67. Plaintiff's request for the award of prejudgment interest on the resulting compensatory damage award is denied.

The Court having ordered remittitur of damages as noted herein, Moore, by counsel, pursuant to Virginia Code 8.01-383.1, stated in open court that Moore accepts the remittitur and judgment of the court for the reduced sums, without protest or exception. Therefore,

It is ADJUDGED, ORDERED and DECREED, that the plaintiff, W. Bedford Moore, III, have judgment against the defendant, James N. Fleming, in accordance with the aforesaid judgment of the Court in the sum of TWO HUNDRED THIRTY THREE THOUSAND THREE HUNDRED THIRTY THREE AND 34/100 DOLLARS ($233,333.34). It is further ADJUDGED, ORDERED and DECREED that pursuant to Rule 5:9 of the Supreme Court of Virginia the transcript of the hearing of April 16, 1985 ore tenus be, and the same hereby is, made a part of the record in this case.

Fleming having indicated his intention to appeal this Final Judgment Order, and having moved the Court to suspend execution of this judgment, the Court ORDERS that execution of this judgment is suspended so long as Fleming timely prosecutes his appeals and thereafter so long as the matter is under consideration by the Supreme Court of

Virginia; provided, however, that Fleming or someone for him shall file in the office of the Clerk of this Court an appeal bond approved by the Judge of this Court within thirty (30) days of the entry of this Order in the penalty of Two hundred thirty-three thousand Dollars ($233,000.00), reciting this judgment and Fleming's intention to appeal this Final Judgment Order. This Court further ORDERS that the two appeal bonds previously filed in this matter shall be released 30 days after the entry of this Order and the Clerk of this Court shall return them to counsel for Fleming.

ENTER /s/ F. W. Harkrader, Jr.
Judge

DATE: 5/13/85

IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

JAMES N. FLEMING,

Appellant,

v.

W. BEDFORD MOORE, III,

Appellee

PETITION FOR APPEAL

September 2, 1983

* * *

II. ASSIGNMENTS OF ERROR

(A) The trial court erred in failing to either grant Fleming's Motion to Dismiss or strike plaintiff's evidence because the alleged libel was an absolutely privileged expression of opinion under the First Amendment.

(B) The trial court erred in failing to strike plaintiff's evidence because the alleged libel was not defamatory as a matter of law.

(C) The trial court erred in failing either to grant Fleming's Motion

for Summary Judgment or his motion to strike plaintiff's evidence because plaintiff failed to prove special damages, which must include but are not limited to monetary loss.

(D) The jury's award is so excessive that it indicates the jury was influenced by passion, prejudice or corruption, or misconceived or misconstrued the law or facts.

(E) The jury's award of prejudgment interest at the rate of 12% per annum is contrary to law because prejudgment interest is not allowable on punitive damages and, further, because 12% exceeds the maximum allowable rate of prejudgment interest.

(F) The trial court erred in concluding that Moore was not a public figure.

(G) The trial court erred in refusing to instruct the jury that, in

order to find Fleming liable for compensatory damages, it must find that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true.

(H) The trial court erred in refusing to strike plaintiff's evidence on punitive damages because there was insufficient evidence on which the jury could conclude that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true.

(I) In the specific circumstances and context of this case, the plaintiff's striking every black juror to create a jury without blacks deprived Fleming of his right to due process under the Fifth and Fourteenth Amendments and to a jury trial under the Seventh Amendment.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 7th day of June 1984.

James N. Fleming, Appellant,

against Record No. 831446
Circuit Court No. 976-L

W. Bedford Moore, III, Appellee.

From the Circuit Court of Albemarle County

Upon the petition of James N. Fleming an appeal is awarded him from a judgment rendered by the Circuit Court of Albemarle County on the 3rd day of June, 1983, in a certain proceeding then therein depending, wherein W. Bedford Moore, III, was plaintiff and the petitioner was defendant.

And it appearing that an appeal bond in the penalty of $250,000, conditioned according to law, has heretofore been given in accordance with the provisions of

section 8.01-676 of the Code, additional bond is required in the amount of $460,000.

This appeal, however, is limited to the consideration of assignments of error D, E, G, and H which read as follows:

D The jury's award is so excessive that it indicates the jury was influenced by passion, prejudice or corruption, or misconceived or misconstrued the law or facts.

E The jury's award of prejudgment interest at the rate of 12% per annum is contrary to law because prejudgment interest is not allowable on punitive damages and, further, because 12% exceeds the maximum allowable rate of prejudgment interest.

G The trial court erred in refusing to instruct the jury that, in order to find Fleming liable for compensatory damages, it must find that

Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true.

H The trial court erred in refusing to strike plaintiff's evidence on punitive damages because there was insufficient evidence on which the jury could conclude that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignments of error No. D, E, G and H, and the briefs to filed shall be limited to such discussion as is relevant to the assignments or error upon which this appeal is awarded.

This petition for appeal is refused as to the remaining assignments of error.

THE CODE OF VIRGINIA
Second Edition

Including legislation to the year

1860

Published pursuant to law

* * *

815

* * *

CHAPTER CC

OFFENCES BY NEGROES

* * *

816 [TIT. 54,

* * *

1847-8, p. 126, §14 * * *

Id. § 6 11. A negro shall be punished with stripes:

First, If he use provoking language or menacing gestures to a white person:

* * *

817

* * *

12. Whenever, by statute, punishment with stripes is prescribed, the number of stripes shall be in the discretion of the court or justice by whom the offence is tried, so as not to exceed thirty-nine at one time.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

EDDIE UPCHURCH,

Complainant,

vs. No. CL 87-2930

AARON WHEELER
3206 Dunne Brook Court
Virginia Beach, VA 23456

AND

THE VIRGINIA CONFERENCE
OF THE NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF
COLORED PEOPLE
SERVE ANY OFFICER:
112 East Clay Street
Richmond, VA 23219

Defendants.

MOTION FOR JUDGMENT
[Filed December 23, 1987]

COMES NOW the Complainant, Eddie Upchurch, and respectfully alleges as follows:

1. Plaintiff is employed by the City of Virginia Beach as a police officer, and was so employed on June 20, 1987.

2. On or about June 20, 1987,

while on duty, Officer Upchurch received a call from the Police Dispatcher to assist Officer Audrey Turner with the apprehension of three juveniles for curfew violation and shoplifting.

3. After the apprehension of the three juveniles at the intersection of Independence and Buckner in Virginia Beach, Officer Eddie Upchurch and Officer Turner attempted to release the three juveniles into the custody of one Fred T. Gilchrist, III.

4. During the release of the three juveniles to Fred T. Gilchrist, III, Maxine Gilchrist became disorderly and was placed under arrest by Officer Turner.

5. During Maxine Gilchrist's arrest, Fred T. Gilchrist, III assaulted Officer Turner on several occasions in an attempt to free Maxine Gilchrist from the arrest.

6. On or about June 20, 1987, at

approximately 2:00 a.m., Officer Eddie Upchurch attempted to arrest Fred T. Gilchrist, III for assault on a police officer and interfering with the duties of a police officer. During this arrest, Fred T. Gilchrist, III attempted to take Officer Eddie Upchurch's service revolver from him. A struggle ensued over the service revolver, and the service revolver was discharged one time, killing Fred T. Gilchrist, III.

7. As a result of the shooting, the Virginia Beach Police Department's homicide squad, along with the Virginia Beach Police Department's internal affairs division and attorneys form the Virginia Beach Commonwealth Attorney's Office responded and initiated investigations into the shooting.

8. On or about June 24, 1987, Aaron Wheeler, Chairman of the Legal Redress Committee for the Virginia Beach

Chapter of the National Association for the Advancement of Colored People called a press conference in which he characterized the shooting of Fred T. Gilchrist, III as "murder" and called for Officer Eddie Upchurch's and Officer Audrey Turner's termination from the Virginia Beach Police Department. At the time Aaron Wheeler made these statements, he had actual knowledge that the statements were false.

9. Prior to making these statements, Aaron Wheeler had had conversations with members of the Virginia Beach Police Department and Robert Humphries of the Virginia Beach Commonwealth Attorney's Office. Both the Virginia Beach Police Department and the Commonwealth Attorney's Office had indicated to Mr. Wheeler that they were in the process of investigating the shooting and would share their investigation with Aaron Wheeler and the NAACP. Therefore,

at the time Aaron Wheeler made these statements, he had actual knowledge that the investigations into the shooting had not been concluded, and his statements were made with reckless disregard of the probable falsity.

10. On or about July 3, 1987, after Commonwealth's Attorney Paul A. Sciortino cleared Officer Eddie Upchurch of any criminal wrong-doing in the shooting of Fred T. Gilchrist, III, Aaron Wheeler, as Chairman of the Legal Redress Committee for the National Association for the Advancement of Colored People, called a press conference and again accused Officer Eddie Upchurch of murder, insinuated that the shooting was racially motivated, and threatened the City of Virginia Beach that if they did not fire Officer Eddie Upchurch, that the black community would take action. At the time Aaron Wheeler made these statements about Officer

Upchurch on July 3, 1987, he was aware that the Commonwealth's Attorney's Office had made a thorough investigation into the shooting and had determined that there was no criminal wrong-doing on the part of Officer Upchurch. Aaron Wheeler had actual knowledge that Officer Upchurch had not committed murder, and intentionally made these statements knowing them to be false.

11. On or about July 9, 1987, Garth Wheeler, President of the Fraternal Order of Police Lodge #8, called upon Aaron Wheeler to apologize for his verbal attacks on Officer Upchurch and to retract his statements. As a result of Garth Wheeler's request, Aaron Wheeler called a news conference in which he refused to retract his previous accusations and stated, "Hell will freeze over before I apologize over this incident for the shooting of that victim. People have

called this a black and white incident, and trying to keep race out of this is difficult."

12. On or about September 10, 1987, the Virginia Beach Police Department released the results of their 3 1/2 month investigation into the shooting of Fred T. Gilchrist, III by Officer Eddie Upchurch. Upchurch was cleared of any wrong-doing or violation of any departmental policies. As a result of this news release, Aaron Wheeler called another news conference in which he accused the Police Department of letting an injustice prevail and called upon the Mayor and the City Council to take another look at the incident and to dismiss the officer. Wheeler went on to indicate that if the Police Department refused to dismiss the officer, that the NAACP will take action on its own. At the time that Aaron Wheeler called this news conference, he had the results of three

different investigations which indicted that Officer Upchurch had done nothing criminally wrong and had not violated any departmental policies. Aaron Wheeler had actual knowledge that the statements he was making were false and the sole purpose was to slander Officer Upchurch and the Virginia Beach Police Department.

13. Aaron Wheeler made each of the foregoing statements to members of the local press, knowing or having reason to believe that each statement would be printed in the local newspapers or otherwise disseminated to the public.

14. On or about June 24, 1987, July 3, 1987, July 10, 1987, August 16, 1987, and September 10, 1987, the malicious and defamatory statements made by the Defendant were published in The Virginian-Pilot and Ledger Star newspapers and disseminated to the public.

15. At all times mentioned above

Aaron Wheeler was acting as Chairman of the Legal Redress Committee for the Virginia Beach Chapter of the State of Virginia and National Association for the Advancement of Colored People, herein before referred to as the NAACP.

16. The remarks made by the Defendant Aaron Wheeler were made with knowledge of their falsity and were made intentionally, maliciously and with the express intent to cause harm and damage to the Plaintiff.

17. At all times mentioned above, the NAACP was aware of the statements made by Wheeler, was aware of the results of the investigations which exonerated the Plaintiff yet did nothing to cause Wheeler to retract his said statements or set the record straight or offer any public or private apology to the Plaintiff. On the contrary, the NAACP approved and tacitly accepted as its own remarks, the

defamatory remarks made to the press by its representative, Aaron Wheeler.

18. As a direct result of the malicious defamatory statements that the Defendant made with actual knowledge of their falsity, the Plaintiff was deprived of income in the form of wages and other benefits. Plaintiff has also suffered damage to his reputation and standing in the community, embarrassment, humiliation and mental suffering.

WHEREFORE, Plaintiff respectfully prays this Court to award Plaintiff the following:

1. Compensatory damages from each Defendant, jointly and severally, for lost wages, benefits, damage to his reputation and standing in the community, embarrassment, humiliation and mental suffering, in the amount of $1,000,000.00.

2. Punitive damages from each Defendant, jointly and severally, for the

defamatory statements made intentionally, maliciously, and with the express intent to cause harm and damage to the Plaintiff, in the amount of $1,000,000.00.

3. Grant such additional relief as the Court deems proper.

Plaintiff requests a trial by jury.

EDDIE UPCHURCH

/s/ Kenneth W. Stolle

KENNETH W. STOLLE
P. O. Box 822
Virginia Beach, VA 23451

MOTION OF DEFENDANT
VIRGINIA STATE CONFERENCE N.A.A.C.P.
FOR SUMMARY JUDGMENT
[Filed June 8, 1988]

The defendant Virginia State Conference of the National Association for the Advancement of Colored People moves the court to enter summary judgment for the defendants and to dismiss the plaintiff's action with prejudice.

I

The plaintiff's responses to the Request for Admission served on 21 March 1988 and to the Interrogatory served on 21 March 1988 establish that the sole bases for the plaintiff's action are his allegations:

(a) that Aaron Wheeler characterized as "murder" or as "senseless murder" the fatal shooting of Fred T. Gilchrist, III, by the plaintiff, Eddie Upchurch, and

(b) that Aaron Wheeler insinuated that the shooting was racially motivated.

In his answer to the request for admission (herewith filed), the plaintiff denies that these statements are the sole basis for the pending action. Yet, in response to the interrogatory (herewith filed) that he state what other basis there is for his action, the plaintiff says merely that the defendants made and continued to make numerous statements

characterizing the homicide as murder.

II

The alleged characterization of the fatal shooting of a citizen by a policeman as murder and the alleged disputation of the conclusion of the Commonwealth's Attorney that the homicide was an act of self defense and an accidental shooting are pure expressions of opinion not amounting to "fighting words" which, being privileged by the First Amendment to the Federal Constitution and by article 1, section 12 of the Constitution of Virginia, cannot form the basis of an action for defamation. As was said in Chaves v. Johnson, 230 Va. 112, 119, 335 S.E.2d 97, 101-2 (1985), "It is for the court, not the jury, to determine as a matter of law whether an allegedly libellous statement is one of fact or one of opinion."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

| | | |
|---|---|---|
| EDDIE UPCHURCH, | : | |
| Complainant, | : | |
| vs. | : | C.A. NO. 88-0637-N |
| AARON WHEELER | : | |
| AND | : | |
| | | Filed: |
| THE VIRGINIA CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, | : | Sept. 19, 1988 |
| Defendants. | : | |

PETITION FOR REMOVAL

To the Honorable Judges of the United States District Court for the Eastern District of Virginia -

The petition of The Virginia State Conference of the National Association for the Advancement of Colored People (hereinafter "Conference") and of Aaron Wheeler (sometimes hereinafter "Wheeler") respectfully shows:

1. On or about 23 December 1987 an

action against petitioners for alleged defamation was commenced in the Circuit Court of the City of Virginia Beach, in the State of Virginia, entitled Eddie Upchurch, plaintiff, vs. Aaron Wheeler and the Virginia Conference of the National Association for the Advancement of Colored People, defendants (At Law No. CL 87-2930). Photocopies of papers here material which have been filed or served, with identification as next shown, are attached.

Exhibit #1 - Notice of Motion for Judgment - issued on 6 January 1988

Exhibit #2 - Motion for Bill of Particulars - served by Conference on 19 January 1988

Exhibit #3 - Bill of Particulars-served by plaintiff on 28 January 1988

Exhibit #4 - Special Plea in Bar-filed by Conference on or about 9 February 1988

Exhibit #5 - Order [overruling Plea in Bar]-

entered on_____ March 1988

Exhibit #6 - Request for Admissions - served by Conference on 21 March 1988

Exhibit #7 - Answer to Request for Admissions - served by plaintiff on 13 April 1988

Exhibit #8 - Interrogatory- served by Conference on 21 March 1988

Exhibit #9 - Answer to Interrogatory- served by plaintiff on 13 April 1988

Exhibit #10 - Motion of Summary Judgment - filed by Wheeler on or about 2 April 1988

Exhibit #11 - Motion for Summary Judgment - filed by Conference on or about 7 June 1988

Exhibit #12 - Letter overruling Motions for Summary Judgment - dated 16 August; mailed 17 August; received by Wheeler's attorney on 18 August; received by attorney for Conference on 19 August 1988

Exhibit #13 - Sketch for order-

submitted_____
September 1988

2. The gravamen of the motion of judgment is that, as Chairman of the Legal Redress Committee of the Virginia Beach Branch of the National Association for the Advancement of Colored People, Wheeler in more than one press conference characterized as "murder" or as "senseless murder" the fatal shooting of a 24 year old black man by the plaintiff police officer (who is white) and insinuated that the shooting was racially motivated. The Conference is alleged to be vicariously liable for Wheeler's assertions. Wheeler is a black person.

3. Nowhere is there any suggestion that Aaron Wheeler was or ever claimed to have been or was believed to have been a witness to the homicide or to anything which led to the homicide. The Request for Admissions (Exhibit #6), the Answer

thereto (Exhibit #7) the Interrogatory (Exhibit #8), the Answer thereto (Exhibit #9), and the newspaper articles submitted with the Bill of Particulars (Exhibit #3), which by reference are incorporated into the Motion for Judgment (Exhibit #1), establish the context in which Wheeler is alleged to have characterized the fatal shooting by the plaintiff police officer as murder and to have insinuated that the killing was racially motivated, e.g.:

> "Upchurch [the instant plaintiff police officer] in his statement said he felt pressure on his gun, leading him to believe that Gilchrist was trying to take it.
>
> " 'In an effort to prevent that from happening' Sciortino [attorney for the Commonwealth] said, Upchurch 'grabbed his weapon and in the ensuing struggle he unintentionally discharged' the gun. The bullet struck Gilchrist in the chest. He fell to his knees and died.
>
> "Other witnesses, including the three youths, Turner and Maxine Gilchrist, said Fred Gilchrist's hand was not on Upchurch's gun.
>
> " 'No fingerprints other than those of Officer Upchurch were found on

his weapon,' Sciortino said.

"The medical examiner's findings 'tend to corroborate' witnesses' statements that the gun was 'intentionally fired,' Sciortino said.

" 'In addition, the results of the gunshot residue test done on the victim's hand do not support the assertion that the victim had his hand on the officer's gun at the time it was discharged,' Sciortino said."

(Request for admissions - Item 4; Quotations from newspaper).

4. In his Motion for Summary Judgment (Exhibit #10) the defendant Wheeler asserted:

a. The alleged statements attributed to the defendant as set forth in the motion for judgment constitute opinion, privileged under the First Amendment to the Constitution of the United States and Article I, Section 12 of the Constitution of Virginia.

b. The statements alleged to have been made by the defendant are not capable of defamatory meaning.

5. In its Motion for Summary Judgment (Exhibit #11), the Conference asserted:

i. The plaintiff's responses to the Request for Admission served on 21 March 1988 and to the Interrogatory served on 21 March 1988 establish that the sole bases for the plaintiff's action are his allegations:

(a) that Aaron Wheeler characterized as "murder" or as "senseless murder" the fatal shooting of Fred T. Gilchrist, III by the plaintiff, Eddie Upchurch, and

(b) that Aaron Wheeler insinuated that the shooting was racially motivated.

ii. The alleged characterization of the fatal shooting of a citizen by a policeman as murder and the alleged disputation of the conclusion of the Commonwealth's Attorney that the homicide was an act of self defense and an accidental shooting are pure expressions of opinion not amounting to "fighting words" which, being privileged by the First Amendment to the Federal Constitution and by article 1, section 12 of the Constitution of Virginia, cannot form the basis of an action for defamation.

6. Essentially the same position had been asserted by the conference in its Special Plea in Bar; the evidentiary bases for which were the Motion for Judgment (Exhibit #1), the Motion for Bill of

Particulars (Exhibit #2), the Bill of Particulars (Exhibit #3), and the failure of the plaintiff to respond to the express requests for reply to new matter alleged in the Special Plea in Bar (Exhibit #4) as, by Rule 3:12 of the Rules of the Supreme Court of Virginia, the plaintiff was directed to do. The Honorable John K. Moore, Judge, who heard argument on the Special Plea in Bar and denied same, was not persuaded that the new matters stated in the Special Plea in Bar stood as admitted by the failure of the plaintiff to respond thereto.

7. By letter dated 16 August 1988, mailed on 17 August, received by Wheeler's attorney on 18 August by the Attorney for the Conference on 19 August 1988, the Honorable H. Calvin Spain, Judge, who on 9 August 1988 had heard the arguments of counsel, ruled that the Motions for Summary Judgment were "untimely" and for

such reason would be denied.

8. The above described litigation is a civil action which may be removed to this court by the petitioners, defendants therein, pursuant to the provisions of Title 28, United States Code, Section 1443, in that, solely by reason of race and color, and in violation of Title 42, United States Code, Section 1981, petitioners are denied and cannot enforce in the courts of the State of Virginia the right, under Article 1, Section 12 of the Constitution of Virginia, as construed in Chaves v. Johnson 230 Va. 112, 119, 335 S.E. 2d 97 101-2 (1985), "to teach, preach, write, or speak any [pure expression of] opinion, however ill-founded, without inhibition by actions for libel and slander", and the concomitant right to have the court, in advance of trial, "determine as a matter of law whether [the] allegedly libelous

statement[s are assertions] of fact or [expressions] of opinion". (Id.).

9. Notwithstanding the Thirteenth Amendment to the Constitution of the United States and Section 1981 of Title 42 of the United States Code, the courts of Virginia and, particularly, the highest court of the State of Virginia tolerate the lingering viability of the 1847-48 Act of the General Assembly of Virginia, concerning Offenses By Negroes wherein, inter alia, it was ordained:

> "A negro shall by punished with stripes: First, if he use provoking language or menacing gestures to a white person."

Here, the failure of the court to rule whether Wheeler's assertions were fact or opinion subjects the petitioners to the onus of preparation and trial, and to the risk of an adverse verdict and judgment, for having mad__ pure expression of opinion, such as white citizens may freely make without inhibition by actions for

libel and slander.

10. In Fleming v. Moore, 221 Va. 884, 275 S.E. 2d 632 (1981) (Fleming I) the Supreme Court of Virginia upheld the trial judge's denial of constitutional privilege to a black defendant's pure expression of opinion as to what was and what was not wanted by the white plaintiff who, for fourteen months, had actively opposed the defendant's applications for re-zoning to permit housing for people of low and moderate income. The only justification offered by the appellate court for such holding was: "Since Fleming is not a media defendant and Moore is not a public figure, Gertz [v. Robert Welch, Inc., 418 U.S. 323 (1974)] does not control the present case." (221 Va. at 893, 275 S.E. 2d at 638).

11. Because the trial court had erroneously instructed the jury that Fleming's expression of opinion was libel

per se, the Supreme Court of Virginia reversed. Noting, however, that under long established precedent Moore's failure to allege or prove monetary loss would bar recovery, the Supreme Court of Virginia "modified" its earlier holdings that emotional upset and embarrassment cannot constitute "special damages" (221 Va. at 894; 275 S.E. 2d at 639).

12. In allowing a second appeal, Fleming v. Moore, sub nom, The Gazette v. Harris 229 Va. 1, 325 S.E. 2d 713 (1985) (Fleming II), the Supreme Court of Virginia, without any stated reason then given summarily rejected the assignments of error which presented questions of constitutional privilege. In deciding the second appeal it arbitrarily adhered to its earlier disposition of such questions. (229 Va. at 46).

13. In light of the jury awards which, by reason of their excessiveness,

the court characterized as being "not the product of a fair and impartial decision" and "on its face indicat[ive of] prejudice or partiality", the Supreme Court of Virginia remanded in Fleming II for "substantial" remittitur or, at the option of the plaintiff, a new trial limited to the assessment of damages. The 1847-48 legislation on the subject of Offenses By Negroes limited the severity of punishment to thirty-nine (39) stripes at any one time.

14. Neither of the litigants in Chaves v. Johnson, supra, was black; and neither was either of the litigants in Great Coastal Express, Inc., v. Ellington 230 Va. 142, 334 S.E. 2d 846 (1985). Both cases were decided on September 15, 1986. In Great Coastal the court, without so saying, repudiated the tortured reasoning of its penultimate paragraph of Fleming I which had given the second jury license to

punish Fleming for expressing his opinion and thereby provoking a white person.

15. By petitions for rehearing, timely filed following the denial of his third petition for appeal, Fleming asked the Supreme Court of Virginia to conform the final judgment in his case to the constitutional principles which then recently had been set forth in Chaves. Except for the difference in the race of the defendants, Fleming's case is indistinguishable from Chaves. Nevertheless, Fleming's 1985 petition for rehearing was denied.

16. But for such lingering viability of the 1847-48 legislation hereinabove mentioned, it is unlikely that the subject defamation action would have been brought; and it is certain that, if brought, it would have been summarily dismissed upon motion therefor and a showing that the action is predicated upon

a pure expression of opinion, not amounting to fighting words.

17. On 15 September 1988 the instant petitioners filed with the Supreme Court of Virginia their petition for a stay of the proceedings in the defamation action which is scheduled for trial on 21 September 1988 and for a writ of mandamus ordering the circuit judge to whom the action is or will be assigned to make a determination and, in advance of trial, to rule as a matter of law whether the alleged utterances of Aaron Wheeler were statements of fact or expressions of opinion.

18. The thirteenth day after receipt by the defendants of the letter opinion of the Honorable H. Calvin Spain having been on Saturday, 17 September, or Sunday, 18 September, the petitioners are advised that this petition may not be filed later than this 19th day of

September, 1988.

Wherefore, petitioners pray that the above action now pending against them in the Circuit Court of the City of Virginia Beach be removed therefrom to this court.

THE VIRGINIA STATE CONFERENCE OF NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Petitioner

By: /s/ S. W. Tucker,
Its Attorney

AARON WHEELER, Petitioner

By: /s/ Sa-ad El'Amin,
His attorney

[Verification Omitted]